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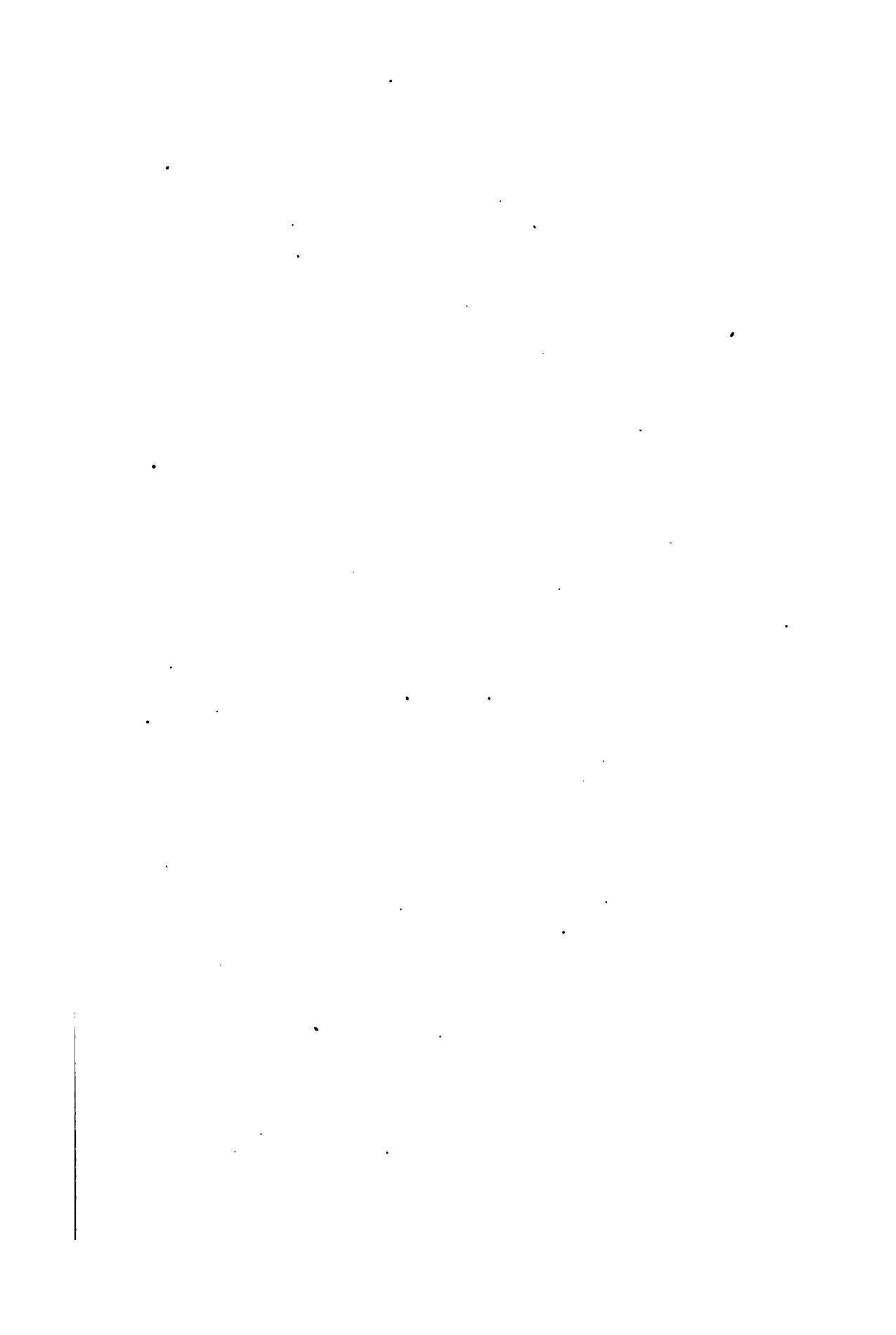
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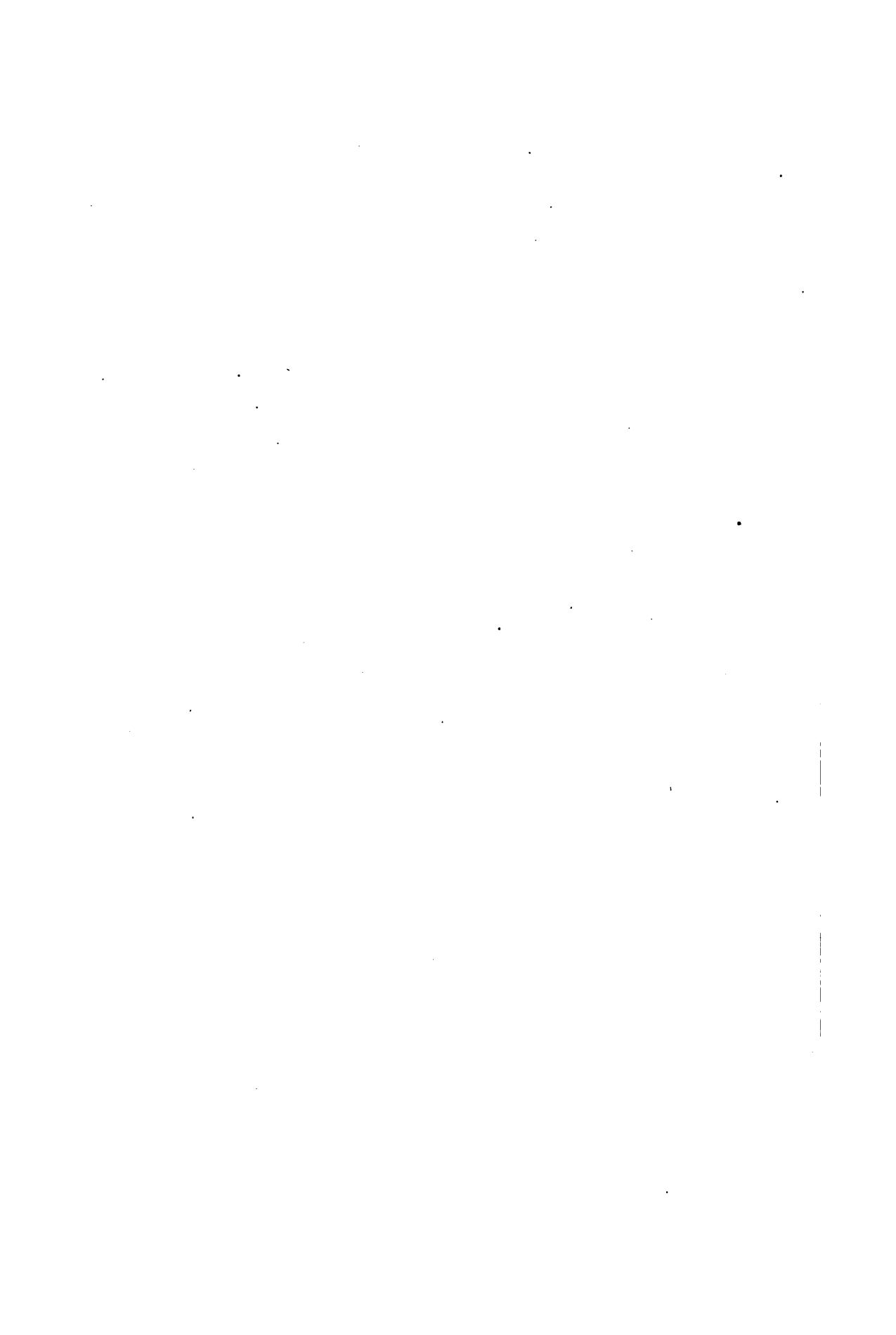
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Luzerne Legal Register Reports

CONTAINING

CASES

DECIDED IN THE

SEVERAL COURTS OF THE COUNTY OF LUZERNE, TOGETHER WITH CERTAIN
CASES DECIDED IN OTHER COURTS IN PENNSYLVANIA.

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<p style="text-align: right;">1810.</p> <p>(Certiorari) 5 Sm. Laws, 161, W.-B. & H. Ice Co. v. Jones, 68.</p> <p style="text-align: right;">1812.</p> <p>(Estates.) Sm. Laws, 395. Flick v. Bergold, 99.</p> <p style="text-align: right;">1834.</p> <p>(Appeals.) P. L. 547, Hanover Twp. Schools, 142.</p> <p style="text-align: right;">1836.</p> <p>(Quo Warranto) P. L. 621, Com. v. Kleeman, 30.</p> <p>(Highways.) McCall v. D., L. & W., 61.</p> <p>(For. Att.) P. L. 5802, Mehalik v. Tomshe, 235.</p> <p>(Mandamus.) P. L. 621, Rishel v. Council, 364.</p> <p style="text-align: right;">1845.</p> <p>(Wages.) P. L. 450. Mason v. Hughes, 82.</p> <p style="text-align: right;">1850.</p> <p>(Dist. Att'y.) P. L. 654, Slattery v. Controller, 69.</p> <p style="text-align: right;">1851.</p> <p>(Service.) Vederman v. Railroad, 380.</p> <p style="text-align: right;">1852.</p> <p>(Ad'l Names Defts.) P. L. 574. Bartels v. Maslowski, 385.</p> <p style="text-align: right;">1860.</p> <p>(Grand Jury.) P. L. 427. Com. v. Doran, 20.</p> <p>(Poor Dist. Tax.) P. L. 538. Mundy v. Gaertner, 121.</p> <p style="text-align: right;">1862.</p> <p>(Poor.) P. L. 178. Eckert v. Walsh, 78.</p> <p style="text-align: right;">1863.</p> <p>(Poor.) P. L. 298. Mundy v. Gaertner, 121.</p> <p style="text-align: right;">1864.</p> <p>(Poor.) P. L. 326. Mundy v. Gaertner, 121.</p> <p style="text-align: right;">1867.</p> <p>(Poor.) P. L. 376, Mundy v. Gaertner, 121.</p> <p style="text-align: right;">1870.</p> <p>(Appeals.) P. L. 269. Smith v. Smith, 336.</p> <p style="text-align: right;">1872.</p> <p>(Distress.) Williams v. Kocher, 250.</p> <p style="text-align: right;">1874.</p> <p>(Mun. Cont.) P. L. 230. Griffith v. Twp., 7.</p> <p>(Poor.) P. L. 43. Eckert v. Walsh, 77.</p> <p style="text-align: right;">1876.</p> <p>(Att. Wages.) Mason v. Hughes, 81.</p>	<p style="text-align: right;">1885.</p> <p>(Schools.) P. L. 187. Pittston Twp. Schools, 51.</p> <p>(Claims ag. Boro.) P. L. 160. Quigley v. Borough, 223.</p> <p style="text-align: right;">1887.</p> <p>(Dist. Att'y.) P. L. 138. Slattery v. Controller, 69.</p> <p style="text-align: right;">1889.</p> <p>(Att. Wages.) Mason v. Hughes, 82.</p> <p>(Paving.) P. L. 288, Berwick v. Sponsler, 402.</p> <p>(Paving.) P. L. 325. Berwick v. Sponsler, 402.</p> <p style="text-align: right;">1891.</p> <p>(Mine Law.) Kitchen v. L. V. R. R., 21.</p> <p>(Mine Law, Foreman.) Hannon v. D. & H., 187.</p> <p>(Officer's Bond.) P. L. 61. Breisch v. Hazle Drug, 270.</p> <p style="text-align: right;">1893.</p> <p>(Elections.) P. L. 424. West v. County, 473.</p> <p style="text-align: right;">1895.</p> <p>(Claims Boro.) P. L. 426. Quigley v. Borough, 223.</p> <p style="text-align: right;">1897.</p> <p>(Interpl.) P. L. 95. Ruth v. Auto. Co., 73.</p> <p style="text-align: right;">1901.</p> <p>(Sci. fa.) P. L. 617. Bartels v. Maslowski, 383.</p> <p>(Tax Claims.) P. L. 364. Berwick v. Sponsler, 401.</p> <p>(Mech. Liens.) P. L. 431. Northrup v. Spak, 463.</p> <p>(Highways.) P. L. 531. McCall v. D., L. & W., 61.</p> <p>(Service.) Mason v. Hughes, 82.</p> <p>(Poor Taxes.) P. L. 578. Mundy v. Gaertner, 120.</p> <p>(Mech. Liens.) P. L. 431. Ott v. Mark Con. Co., 183.</p> <p>(Mine Foreman.) P. L. 342. Hannon v. D. & H., 189.</p> <p>(Replevin.) P. L. 88. Com. v. Ferrarini, 288.</p> <p style="text-align: right;">1903.</p> <p>(Mandamus.) P. L. 32. Rishel v. Council, 364.</p> <p>(Sci. fa.) P. L. 261. Bartels v. Maslowski, 383.</p> <p>(Service.) Mason v. Hughes, 82.</p> <p style="text-align: right;">1905.</p> <p>(Replevin.) P. L. 163. Brown v. Judge, 437.</p> <p>(Judgments.) P. L. 286. Bower v. Balt. Life, 446.</p> <p>(Divorce.) P. L. 211. McDermott case, 29.</p> <p>(Health.) P. L. 312. McKenna, License, 109.</p> <p>(Mech. Liens.) P. L. 172. Ott v. Duplan, 285.</p> <p style="text-align: right;">1907.</p> <p>(Marr. Woman.) P. L. 227. Watkins case, 345.</p> <p>(Jurisdiction.) Drum v. Dingelacker, 455.</p>
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<p style="text-align: center;">1909.</p> <p>(Dec. Est.) P. L. 386. <i>Morris & Co. v. Horwitz</i>, 287.</p> <p>(Marr. Woman.) P. L. 182, <i>Watkins case</i>, 345.</p> <p>(Warehouse Receipts.) P. L. 19. <i>Mish v. Levy</i>, 356.</p> <p style="text-align: center;">1911.</p> <p>(Schools.) <i>Pittston Twp. Schools</i>, 51.</p> <p>(Schools.) Sec. 537. <i>Kehoe v. Dist.</i>, 75.</p> <p>(Schools.) Art. 24. <i>Hanover Twp. Audit</i>, 142.</p> <p>(Service.) P. L. 711. <i>Vederman v. C. R. R.</i>, 194.</p> <p>(Benef. Soc.) P. L. 581. <i>Woodmen v. Radzewicz</i>, 244.</p> <p>(Carriers.) P. L. 838. <i>Mish v. Levy</i>, 356.</p> <p>(Service.) <i>Vederman v. R. R.</i>, 381.</p> <p style="text-align: center;">1913.</p> <p>(Twp. Contracts.) P. L. 306. <i>Griffith v. Twp.</i>, 7.</p> <p>(Elections.) P. L. 568. <i>Connell v. Kennedy</i>, 87.</p> <p>(Appeals.) P. L. 288. <i>Audit Hanover Twp.</i>, 141.</p> <p>(Benef. Soc.) P. L. 207. <i>Pjatnik v. Koscelanski</i>, 261.</p> <p>(Marr. Woman.) P. L. 867. <i>Watkins case</i>, 345.</p> <p>(City Treas.) P. L. 601. <i>Keiser v. Hart</i>, 464.</p> <p>(Nominees.) P. L. 719. <i>West v. Co.</i>, 473.</p> <p style="text-align: center;">1915.</p> <p>(Petitions, Vac.) P. L. 72. <i>Nescopeck Road</i>, 18.</p> <p>(Boro. Code.) Com. v. Kleeman, 30.</p> <p>(Workmen's Comp.) P. L. 753. <i>Zadwick v. L. & W.-B.</i>, 37.</p> <p>(Practice.) <i>Berliner v. Corney</i>, 67.</p> <p>(Primaries) <i>Connell v. Kennedy</i>, 87.</p> <p>(Appeals.) P. L. 311, <i>Hanover Twp. Audit</i>, 141.</p> <p>(Work. Comp.) Sec. 420. <i>Tigue v. Forty Fort Coal Co.</i>, 156.</p> <p>(Practice.) Sec. 8, 20. <i>Scranton F. & G. Co. v. Maier</i>, 171.</p> <p>(Practice, Judgt.) Sec. 12. <i>Beishline v. Kahn</i>, 181.</p> <p>(Marriage.) Sec. 1, 6 Sm. <i>Leventhal case</i>, 298.</p>	<p>(Ejectment.) P. L. 887. <i>Connell v. Casterline</i>, 343.</p> <p>(Sale Goods.) P. L. 543. <i>Mish v. Levy</i>, 356.</p> <p>(Work. Comp.) Sec. 301. <i>Weaver v. L. V.</i>, 373.</p> <p>(Ejectment.) P. L. 887. <i>Coleman v. Coal Co.</i>, 427.</p> <p style="text-align: center;">1917.</p> <p>(Poor Dist.) <i>Eckert v. Walsh</i>, 77.</p> <p>(Dec. Est.) P. L. 447. <i>Sharpless Estate</i>, 161.</p> <p>(Practice, Affi. Def.) P. L. 484, P. & R. v. Bond, 257.</p> <p>(Practice.) Sec. 17. <i>People's v. Lawall</i>, 274.</p> <p>(Practice.) Sec. 21. <i>Trethaway v. Israel</i>, 278.</p> <p>(Mun. Off. Mil. Serv.) P. L. 600. <i>Mackin v. Boro.</i>, 317.</p> <p>(Work. Comp.) <i>Trustees v. L. V. R. R.</i>, 323.</p> <p>(Work. Comp.) Sec. 301. <i>Nowicki v. Coal Co.</i>, 436.</p> <p>(Work. Comp.) Sec. 301. <i>Bachetti v. R. R.</i>, 461.</p> <p>(Work. Comp.) Sec. 423. <i>Dowling v. Hurwitz</i>, 471.</p> <p>(Poor Dist.) <i>Eckert v. Walsh</i>, 77.</p> <p>(Dec. Est.) P. L. 447. <i>Sharpless Estate</i>, 161.</p> <p>(Practice.) Sec. 17. <i>People's v. Lawall</i>, 274.</p> <p>(Practice.) Sec. 21. <i>Trethaway v. Israel</i>, 278.</p> <p style="text-align: center;">1919.</p> <p>(City Treas.) P. L. 903. <i>Keiser v. Hart</i>, 464.</p>
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COURT RULES.

No. 10, Par. 6. (Exceptions.) *W.-B. & H. Ice Co. v. Jones*, 67.

No. 51, Sec. 8 (Continuance.) *Com. v. Sanko*, 135.

No. 43, Sec. 2. (Non pros.) *Wynne v. L. & W.-B.*, 205.

CONSTITUTION.

Art. 14, Sec. 5. (Dist. Atty.) *Slattery v. Controller*, 69.

Art. 5, Sec. 9. (Filing.) *Hanover Audit*, 143.

Art. 3, Sec. 7. (Mech. Lien.) *Ott v. Marks Con. Co.*, 183.

Art. 6, Sec. 4. (Public Officers.) *Mackin v. Boro.*, 322.

Art. 16, Sec. 5. (Service.) *Vederman v. R. R.*, 380.

Court of Common Pleas of Luzerne County.DRUM *et al.* v. DINKELECKER.*Equity—Jurisdiction—Obstructing right of way—Easement—Title.*

1. Equity will take jurisdiction to order removal of a garage erected on alleyway between two properties, and where testimony for plaintiff shows uninterrupted use for forty years and defendant does not contradict facts thus established. It is not necessary in all such cases to aver irreparable injury.
2. Where testimony of witnesses establishes right of way for long period, grant of an easement may be evidenced by prescription or a long enjoyment of the easement claimed under circumstances which raise implication of title originally secured by grant.
3. Laches not attributable to plaintiffs for taking no steps to prevent erection of garage after warning that it would be built, where attempt was made by plaintiff to adjust difficulties, with no more than formal protest, in hope of avoiding litigation.
4. Where testimony *ut supra* indicates a right of way, exact location of boundary line between adjoining properties not material for purpose of bill.

Common Pleas Luzerne county. In Equity. No. 2, June term, 1916.

GARMAN, J., March , 1918.—Plaintiffs aver that they and defendant are residents of the village of Drums, in this county; that plaintiffs are owners and in possession of a lot of land in said village; that on the southwesterly side of said lot there has been an alley, owned in part by plaintiffs and part by owner of lot, on the opposite and westerly side of alley; that said alley has been used in common by plaintiffs and predecessors in title jointly with the owners of the property on the opposite side of the alley for a period of thirty years; that defendant, without license or warrant, on or about January 12, 1916, moved and placed a garage building on said alley, occupying the entire width thereof, about seventy-five feet from the public road, thereby closing the alley and has also obstructed the alley by placing lumber, ashes and other material thereon in such manner as to prevent plaintiffs from using the said alley as they have the right to do; that said garage building is about one foot from the smoke house and about twenty-five feet from the dwelling house of plaintiffs, and in case of fire would expose the buildings to irreparable injury.

The bill prays:

“1. To grant a preliminary injunction, to be perpetual on final hearing restraining said defendant from any further encroach-

ment on the alley aforesaid, and from obstructing same in such manner as to prevent your orators from the free and proper use thereof.

"2. To direct and order said defendant to remove his garage building from the alley aforesaid.

"3. To direct and order said defendant to remove all lumber and other material from the alley aforesaid.

"4. To restore said alley to its former condition and keep the same free and open the entire length and width thereof.

"5. To assess the damages sustained by your orators by reason of the conduct of said defendant and to require the said defendant to pay the same.

"6. To grant your orators such other and further relief as the nature of the case may require."

The defendant admits averments in the first and second paragraphs of the bill and neither admits nor denies but prays proof of the third and seventh paragraphs.

He makes further answer that he denies the averments in paragraph four of plaintiff's bills, and avers: If an alley existed on the southwesterly side of plaintiffs' lot in which defendant has any interest, plaintiffs should remove their fence line and permit the defendant to the use of such land unlawfully enclosed by plaintiffs. No part of the alley is on defendant's land.

That he denies averments of paragraph five and asks proofs thereof.

That he denies the averments in paragraph six, demands proof and avers the defendant has placed a garage on his land which he has a right to do and has not and does not interfere with any right plaintiffs have in the premises. The said garage and lumber are wholly on defendant's land. The plaintiffs are mistaken as to the location of the property line of defendant's land.

That the division line between the properties of plaintiffs and defendant is not at the place claimed by plaintiffs but is located northeast of the line, as claimed by plaintiffs by a distance of several feet.

That the plaintiffs have not now nor ever did have any right or interest in the land upon which the defendant's garage is built, but it is true that plaintiffs and their predecessors in title used defendant's land in a very limited way in passing over same, which use was always by permission of defendant and his prede-

cessors in title. Such entry was not by way of an alley but through defendant's gate, and the placing of the garage and the lumber mentioned in plaintiffs' bill has not closed access to defendant's property by way of a gate within a few feet of where the garage stands.

That the property lines of plaintiffs and defendant were agreed upon in 1908 by the defendant and N. S. Drum, the person through whom the present plaintiffs derived title, and the garage of the defendant and lumber are wholly on the land of the defendant. In the year 1908, after the property lines were agreed upon as aforesaid, the defendant improved his property by laying sidewalk and building a fence across his property two to three feet nearer the front of the property than where the garage now stands, which fence was built at the request and with the knowledge and consent of Mr. N. S. Drum, the then owner of the plaintiffs' property. The building of this fence prevented access by plaintiffs then and up to the time the garage was built to that portion of the defendant's property now occupied by the garage, and if rights there were in the then owner of the plaintiffs' property to a right of way on the defendant's property, such rights were abandoned when the fence was erected and the property improved.

That about a month prior to the erection of the garage plaintiff's attorney, then acting for the plaintiffs, was notified on behalf of defendant that defendant intended to erect a garage where the garage now stands, and if the plaintiffs thought they had any right in the land in question they should apply to the court for relief. The plaintiffs, with knowledge that the defendant intended to erect his garage where it now stands, stood by in silence and saw the garage erected and did not complain about it for about three months after its completion.

That the Court has no jurisdiction of this proceeding because it is an ejectment bill and in order to grant the relief prayed for the location of the division line between the lots must be determined by a jury in a common law court in an appropriate action, defendant averring and claiming that he nowhere encroaches upon the land or rights of the plaintiffs.

That on April 19, 1916, plaintiffs notified defendant to remove his garage and debris, claiming that the same were on the property of the plaintiffs. In answer to said notice defendant notified plaintiffs that the dispute about the line could be amicably adjusted by arbitrators to be selected, which offer was accepted on April 22, 1916, by plaintiffs' attorney, but in violation of this acceptance a bill in equity was instituted without notice to defendant.

That plaintiffs have an adequate remedy at law, and equity is without jurisdiction.

That the defendant avers that the court of equity has no jurisdiction to dispose of the issues raised by the pleadings in this case and avers that the suit should have been brought at law and prays the Court to award an issue to try questions of facts, said issue to be decided *in limine* as provided by the Act of June 7, 1907, P. L. 440, and after hearing on said issue, certify the case to the law side of the Court for proper action according to law.

At the hearing plaintiffs called witnesses who testified that there was a lane between plaintiff's and defendant's properties for about forty years; that it as first extended back seventy-five or eighty feet from the public road, and since 1880 extended to the rear of defendant's lot; and that the lane has been obstructed by defendant's erecting a garage across it and piling lumber and debris upon it.

Defendant relies on propositions, namely:

- 1st. There is no alley as averred by plaintiffs.
- 2nd. The bill contains no allegation of irreparable injury.
- 3rd. There is no testimony that the easement claimed by plaintiffs was created by grant, license or prescription.
- 4th. The plaintiffs were guilty of laches.
- 5th. The evidence shows that the question herein involved concerns the title to land.

In consideration of this case, we are, because of the lack of evidence on the part of the defendant, obliged to conclude that plaintiffs had a right of way or alley from the public road to the road of defendant's lot, partly on plaintiffs' land and partly on defendant's land—the right of way being designated as an alley. We are forced to this conclusion by the uncontradicted evidence thereof on part of plaintiffs.

There was no evidence to contradict the testimony on part of plaintiffs and we therefore find that there was an alley as averred in plaintiffs' bill.

This disposes of defendant's first proposition.

Under this finding the obstruction of the alley would be a nuisance. If, then, nuisance to right of way be established the equitable remedy by injunction may be sought. Hacke's Appeal, 101 Pa. 245.

This proof of plaintiffs establishes the existence and use of an alley as averred by plaintiffs and is not denied by any evidence on part of defendant, wherefore it follows that equity has jurisdiction by injunction.

"On a bill in equity to restrain the interference with a road, if the testimony is such that, if submitted to a jury the only finding could be in favor of the existence of the road, a court of equity has jurisdiction to enter a decree forbidding any obstruction of the road. The law does not offer an adequate remedy." Manbeck *v.* Jones, 190 Pa. 171, and

"Where the right of way is not doubtful, equity has jurisdiction to compel the keeping open of the way, before a decision on the question of the easement is had on the law side of the court." *Ibid.*

"If evidence against the existence of the way had left the matter doubtful the chancellor would hold until the right could be determined by law." *King v. McCully*, 33 Pa. 76.

In *Richmond v. Bennett*, 205 Pa. 270, it was decided that "where in a proceeding in equity, the plaintiff's title is clear, and all the evidence relating to it is of such a character that a judge in a trial at law, upon the same evidence would not be at liberty to submit the question of the plaintiff's title to the jury, equity will grant relief, although there has been no adjudication of the title at common law."

In *Wilson v. Cather*, 214 Pa. 3, citing the above case, the Court said where a plaintiff's "right is clear, however, a chancellor will not hesitate to act. It is not enough for the defendant to deny the plaintiff's right; his denial must be based upon facts which show a substantial dispute."

We therefore hold that as plaintiffs' evidence showed the existence of a lane, or right of way, undenied by any testimony, it must be taken as established and therefore equity will protect the way of encroachment.

This brings us to defendant's second contention that the bill should be dismissed because it does not aver irreparable damage. This point is not well taken in the present instance because the case does not come under that class of cases where damage to property needs to be proved. *Hacke's Appeal, supra*; *Garvey v. Co.*, 213 Pa. 177.

Defendant's third suggestion that "there is no testimony that the easement was created by grant, license or prescription" cannot be sustained. The testimony of witnesses established that there was a right of way, called by them an alley, used at will by plaintiffs and their predecessors and by defendant's predecessors in title for over forty years.

The grant of an easement may be evidenced "by prescription or a long enjoyment of the easement claimed under circumstances which raised an implication of title originally acquired by grant." *Washburn on Easement*, 3 Ed. 27.

"The modern doctrine of prescription requires merely a user and enjoyment of at least twenty years instead of the former requirement of immemorial enjoyment. But * * * while under the ancient doctrine of prescription such an enjoyment was regarded as conclusive evidence of title, prescription as used at this day, only raises a legal presumption of such title, which may be rebutted by other evidence." *Washburn on Easement*, 3 Ed. p. 111.

The fourth ground of defense is that "plaintiffs were guilty of laches". This is set forth in defendant's answer in his eleventh paragraph: "About a month prior to the erecting of the garage by the defendant, the plaintiffs' attorney, Mr. P. L. Drum, who was then acting for the plaintiffs, was notified on behalf of the defendant that the defendant intended to erect a garage where the garage now stands and if the plaintiffs thought they had any right in the land in question, they should apply to the court for relief. The plaintiffs, with the knowledge that the defendant intended erecting his garage where it now stands, stood by in silence and saw the garage erected and did not complain about said garage for about three months after it had been erected."

Plaintiffs explain their delay on the ground that on hearing of defendant's intention to erect the garage, they consulted their lawyer; that the attorney and defendant discussed settlement of the difficulties between the parties and that the delay was thus occasioned. Plaintiffs made immediate protest against encroachment, but, according to the testimony, any delay was to avoid litigation.

Laches is unreasonable delay. Considering the length of time, the character of the structure, and the efforts at amicable settlement, we are not prepared to say that there was such laches as would make a decree in favor of plaintiffs inequitable. The building is a small building that had been used as a coal house for a church and was removed by defendant to the place of dispute.

Defendant's fifth point that the question herein involved concerns the title to land is true to the extent that there is some dissension as to the exact location of the line between plaintiffs' and defendant's property; but as the testimony locates the way, the title becomes immaterial.

We are compelled therefore to find in favor of plaintiffs.

And now, March , 1918, this cause having come on to be heard, and having been argued by counsel, upon consideration thereof it is ordered, adjudged and decreed:

First. That the injunction heretofore granted be and the same is hereby continued.

Second. That the defendant remove the garage building from the alley in question, remove all lumber and other material placed in the alley by defendant and restore said alley to its former condition within thirty days after notice of this order is served upon the defendant or his counsel, and keep the same free and open the entire length and width thereof.

Third. That the cost of removing the garage and other obstructions and restoring said alley to its former condition, together with the costs of this proceeding be paid by the defendant.

W. C. Price, P. L. Drum, for plaintiffs.
Roger Dever, for defendant.

GRIFFITH v. TOWNSHIP OF PLAINS *et al.*

Townships—Commissioners—Contracts—Power—Discretion—Fire alarm system.

1. Where township commissioners, after due advertisement for bids for erecting fire alarm system, award contract to firm of established reputation, on advice from experienced officials of neighboring city, the firm being expert in the business and having a record of nearly two hundred like installations, the award will not be disturbed, lacking proof of abuse of discretion or fraud, even though another presents bid for the work at a less figure—particularly where the other bidder has had no experience in the business and no associate at time of submitting bid, and where even the name of a shadowy company was selected for the occasion and represented no incorporated body.

2. Specification of time limit in contract such as above not essential.

Common Pleas, Luzerne county. No. 2, May term, 1917.

O'BOYLE, J., August 31, 1917.—This case was presented to us for final adjudication, upon bill, oral answer and proof, to ascertain whether "the acceptance of the bid of the Gamewell Fire Alarm Telegraph Company aforesaid, and the award of the contract to it are fraudulent, null and void."

Second. "For an injunction preliminary until hearing and perpetual thereafter, restraining the said defendant township and commissioners and the defendant, the Gamewell Fire Alarm Telegraph Company, from entering into any contract in pursuance of said award by said commissioners, and from performing any such contract," principally for the reason contained in the tenth paragraph of plaintiff's bill, which reads as follows:

"Your orator avers that neither the published notice nor the specifications informed the bidders of the time within which the work was to be finished or the supplies furnished, and in the absence thereof there has been no such competitive bidding as the law requires."

Another, but minor reason is, that "the quantity or amount of the work or supplies were not with sufficient certainty specified in the advertisement."

The Act of May 23, 1913, P. L. 306, requires contracts of townships of the first class, in amounts of five hundred dollars, to be awarded to the lowest and best bidder, after due public notice. A copy of the section of the Act relating to this matter is as follows:

"Section 4. That from and after the passage of this Act, all

contracts or purchases made by any township of the first class, involving the expenditure of over five hundred dollars, shall be in writing, and shall not be made except with the lowest and best bidder, after due notice by the secretary, published once a week for three weeks in one or more newspapers of the county in which such township shall be situated."

It is conceded that Plains township comes within the classification of first class townships, and that the Act just quoted applies to it.

The plaintiff contends that he should have this injunction made perpetual, because the defendant company was not the lowest and best bidder as contemplated by the Act, for the reason that the said plaintiff had, under the name of the Plains Electric Company, presented a bid for the same fire alarm system, which was, in amount, over eleven hundred dollars less than the bid of the Gamewell Company.

The plaintiff further contends that "there has been a persistent effort on the part of the defendant commissioners to disregard the interests of the township, and its taxpayers, in awarding said contract, and that the action of said board of commissioners in making said award has been arbitrary, and based exclusively upon other consideration than the public welfare; that it constitutes a fraud upon your orator and other taxpayers of the township, and is an abuse of discretion of said commissioners."

Exhibit A gives copy of advertisement calling for bids, giving date and place of submission, etc.

Exhibit B gives specifications, regulated time of submitted proposals and accompaniment of certified check for \$100; ability of builders, with proof of training and experience to do the work, with five years' guarantee, number of working days required to finish contract, and detailed apparatus and material—including call stations, conduits, weather caps, wire, whistle blowing apparatus, gong, punching registers, switchboard, battery plant and equipment thereof, motor and generator, switches, line wire equipment, and location of alarm boxes.

Exhibit C gives bid of the Gamewell Company agreeing to install equipment as per specification for \$9,596, percentages thereof on delivery, completion, and acceptance; warning that fluctuation of prices called for acceptance of bids in limited time.

Exhibit D gives bid of Plains Company, saying briefly "We will

install your fire alarm system according to plans and specifications for \$8,494.86."

Exhibit E is a letter from the Plains Company mentioning assistance of an individual who has had special experience in installing fire alarms in three boroughs, and giving assurance as to materials and guarantee and willingness to give bond.

The paragraph of specifications designated "bidder's ability" says that "no award will be made to any bidder until he or they have furnished satisfactory evidence that he or they have had special training and experience in the installation of fire alarm systems, that the apparatus furnished in this installation is of unquestionable quality, and is fully covered by a manufacturers' guarantee against inherent defects for a term of five years. All bidders must state the ultimate number of working days that will be required to complete the installation. Only such bids as cover all the apparatus, material and work, herein specified will be considered and the commissioners of Plains township reserve the right to accept any or reject all bids."

It is contended by counsel for the defendants that there has been no proof of any abuse of discretion, or fraud, but, on the contrary, the evidence clearly establishes that the fire committee to which this question was referred, investigated, and obtained the judgment and advice of men whose skill and ability enabled them to speak with confidence and certainty upon the subject, before they had advertised for bids, and that city commissioner Schuler of Wilkes-Barre, who had for many years served as chief of the fire department of that city, and superintendent of fire alarms McManus, of the same city, recommended the Game-well fire alarm system to the committee; and that their advertising notice was as complete, extensive and certain, as prudence and good judgment could dictate.

DISCUSSION.

We are reliably informed that Plains township has, at the present time, a population of approximately twelve thousand people; that it is one of the wealthiest and largest townships in the State of Pennsylvania, and that the commissioners of the township concluded, in their discretion, to install a fire alarm system, and advertised four or five times in the required number of papers, setting forth the specifications, which we have heretofore set

forth, and that it was their intention to have an up-to-date system, is evidenced from the fact that they required that any person, persons or company should have "special training and experience in the installation of fire alarm systems", and also that "all bidders should state the ultimate number of working days which would be required to complete the installation; that it was not contemplated by them, possibly, that there was any local firm, individual or corporation, located in or near the township of Plains which would or could bid for this contract, and, no doubt, it occasioned some surprise to them when a bid, unsigned by the name of any individual or individuals, but merely the "Plains Electric Construction Company" had presented its bid for a work of this importance.

It is fair to assume, and the evidence so shows, that immediately upon receipt of this bid, the committee discovered that the plaintiff in this case constituted the company, and further that he was never engaged in, nor had he any experience whatever in the installation of a fire alarm system; but on the other hand, was a real estate dealer, and the address which he gave was, as some of the witnesses say, a dilapidated garage, located on one of the streets in the township.

It also appears from the evidence, that there was no one associated with him in the business when the bid was made out and presented to the commissioners.

It also appears that there was no incorporated company, and that the name "Plains Electric Construction Company" was called into being for the exigencies of the case.

It is fair to presume that when these things were discovered, by the commissioners, that their judgment and discretion both prompted them to either treat the bid as a jest, or reject it without much consideration, on the theory that one who had no experience with electricity or fire alarm systems, nor was engaged in any work of a similar nature, was disqualified in every way from performing the work called for in the specifications accompanying the bid. We are not much surprised that the specifications were not turned over to him as quickly as he thought they should have been, because, doubtless, the clerk having them in charge, might wonder what he wanted with them; and they were not bound to furnish specifications, other than those contained in the papers, to every citizen of the township.

The specifications were contained in the advertisement, and we are unable to see that there was any effort at concealment of them from any one.

We are bound to reach the conclusion, in view of the fact that Hartman was a new importation into the case, after the bids had been opened, and after the investigation had been made by the committee to ascertain who composed the "Plains Electric Con-

struction Company", that in the exercise of good judgment and discretion on the part of the commissioners, they rejected the bid of this imaginary company, even though there was a considerable disparity in the difference in the bids of the Gamewell Company and the Plains Electric Construction Company.

It is not the province of the Court to interfere with a discretion of this character.

We cannot hold, after a careful investigation of this case, that the commissioners would be justified in awarding the contract to the company of which the plaintiff was the sole member.

It has been frequently held that the word "responsible", as employed in the Act of May 23, 1874, P. L. 230, directing municipal contracts to be awarded to the lowest responsible bidder, is practically the same as the word "best", as employed in the Act of May 23, 1913, P. L. 306, which provides that "contracts by municipalities shall be awarded to the lowest and best bidder", and that these Acts vest in the commissioners of a township, whose duty it is to award contracts, a discretion, and that their powers are not merely ministerial.

In *Reuting v. Titusville City et al.*, 175 Pa., page 512, it is held:

"Under the Act of May 23, 1874, P. L. 233, directing municipal contracts to be awarded to the "lowest responsible bidder," the municipal authorities acting in their discretion and in good faith, may award the contract to a higher bidder, if considerations of superior skill, promptness or efficiency on the part of such bidder lead them to do so."

And, if this rule should ever be applied, we are unable to find a case to which its application would be more appropriate than the one at bar.

We have no hesitation in saying that the township officers were justified in selecting the Gamewell Company's bid in preference to the Plains Electric Construction Company, when they had before them the information that one hundred and fifty leading cities and towns, including Philadelphia and Pittsburg, had already had this system in operation.

It will be observed, upon examination, that the bid of the Plains Electric Construction Company permitted the institution of any fire alarm system, as its bid made no reference to the Gamewell system.

We are not unmindful of the case of *Edmundson v. Pittsburg School District*, 240 Pa., page 559, referred to by plaintiff's counsel, in support of their theory that the specifications and public notice calling for bids were not specific enough, because they failed to set forth the time within which the work was to be finished, or the supplies furnished.

The Edmundson case related to a school building, where everything involved in its construction, and the time required to con-

struct it, could be, and should be, set forth, in order that all bidders might stand upon a footing of equality, for the reason that if the contractor was not obliged to specify the time in which the building was to be erected and completed, he might suit his own convenience, and place other bidders at a great disadvantage; hence the law requires that the time within which the building is to be erected, should be set forth, and is an essential element of the contract, because it gives to all an equal chance. The style, character of building, materials, the manner in which the work is to be done, the amount and quality of materials, and every other particle necessary for the erection of a complete building, and the time in which the work should be done, can be set forth with absolute certainty.

In this character of work there are active and energetic competitors in almost every community, and it is for the purpose of preventing any underhand work on the part of those having the power to let contracts of this character, that the law has required very minute and detailed specifications.

It was well said by Justice Brown in that decision, that:

"Each proposes to do the same thing though they may differ as to the compensation to be paid them, and all ought to bid upon exactly the same basis."

But the subject of the contract under discussion is not an article in common use, or kept in stock, but is made up after the contract is obtained; so we are unable to see how a municipality could have specified with greater accuracy in its advertisements, or in its specifications, what they desired, in order to have fair competitive bidding. They could not specify the time within which the work was to be completed, unless they had previously selected and adopted the particular system which they had intended to install.

The character of work in this instance is peculiar to the different concerns manufacturing fire alarm systems, and the various mechanisms and appliances used in these systems are covered by patents which are in the exclusive control of the manufacturers of these various systems. And, of course, it naturally follows, that a large concern, having its material ready for immediate use, if the time were specified, could probably drive smaller concerns out of existence, because they might not have the material at hand to enter into competition with them.

The system in this case was not adopted and each was left to bid upon his own systems and set forth in his bid the time in which he or it could do the work, and complete the installation, and then it would be a matter for the consideration of the commissioners to accept any bid presented to them, with a clear knowledge before them as to the time in which the bidder could complete the work upon which he had rendered his bid.

The purpose of the law, as we take it, was to prevent municipal officers from awarding contracts over a certain amount, unless through competitive bidding, and to prevent a monopolist from exacting an exorbitant price for his particular article. Hence, in a case of this character, in our judgment, it was proper that the time should not be stated in which the installation was to be made, as it left each bidder to make his own bid, and state in what time he could perform the work for the amount stipulated. We are unable to see that it would have aided, in any way, the bidders, to have specified the time in which the work was to be done.

In *Philadelphia v. Pemberton*, 208 Pa., page 214, it is held:

"The powers of municipal officers in awarding contracts are not merely ministerial, but discretionary; and they may take into consideration other matters than the mere pecuniary responsibility of the bidder, and they are not bound to make awards to the lowest bidders.

In *Silsby Mfg. Co. v. Allentown*, 153 Pa., page 319, it is held:

"A contract for municipal supplies might also be unassailable although made without competitive bidding, if the article needed was under the protection of a patent, and, therefore, competition was impossible."

It was also held by Hatch, J., in *Gleason v. Dalton et al.*, 28 App. Div. (N. Y.) 555-559-60:

"If the subject matter of the contract is such that competitive proposals would be unavailing, or would not produce any advantage to the city, or the selection of the supplies must be made, after a present inspection and test, or where the thing to be obtained is a monopoly, or the requirement is of personal skill, or professional service, the contract could not be successfully attacked because it had not been let by advertising for competitive bidding."

And our Supreme Court conceded in the case of *Philadelphia County v. City of Pittsburg*, 253 Pa., page 147, citing the above New York case, that there are cases where a compliance with the statutory requirement for competitive bidding would not avail the city, and, therefore, might be dispensed with in letting a contract for municipal supplies.

We are of the opinion that the township authorities could have adopted the Gamewell fire alarm system without requiring any competitive bidding upon it at all; but, in doing so, they would be open possibly to criticism, because it would give to the Gamewell Company a monopoly and permit it to charge its own prices. The township would have been at the mercy of this company, and, therefore, in order to prevent such an unfair advantage, and in order to get the best possible price, as well as the best system, the township commissioners left the adoption of the particular

system open, so that all manufacturers and owners of fire alarm systems might have an opportunity of bidding for the installation of the system, and, with the knowledge before them that there would be competitive bidding, they would be bound to present to the township the best price for which its system could be installed.

Had the specifications been restricted to any one particular system, the township commissioners might have been enjoined from awarding a contract under such specifications.

It was held in *Breen v. McCallin et al.*, 6 Pa. County Court Reports, 658, that:

"Where the specifications for public supplies, under the Act of May 23, 1874, are of such restrictive phraseology as to exclude other manufacturers from competition, the Court will restrain the execution of such a contract at the suit of a taxpayer."

Whatever may be said of the right of the township commissioners to adopt any one system, without asking for bids, certain it is, that they should not be enjoined from asking and permitting all competitors to bid upon the work which they desired to let.

Time was not an essential element, and it would have been practically impossible, if not illegal, to have specified any particular time in the advertisement, or in the specifications, as to when the work was to be installed and completed, because only the concern manufacturing the system adopted could designate the time within which that particular system could be installed.

In our judgment the township commissioners acted not only wisely, but for the best interest of the township, and that in awarding the contract to the Gamewell Company for the furnishing and installation of their system there is no abuse of discretion on their part.

While no requests for findings of fact or law have been presented to us by either side, we however find as matter of law, that there was no legal necessity for the commissioners of the township to publish either in the notice nor the specifications, the time within which the work was to be finished, or the supplies furnished; but that the notice and specifications, as presented, gave to each bidder the freedom of bidding upon the work contemplated, unhampered by time limitation, requiring, however, as set forth in the specifications, that each bidder specify the time in which he or it would be able to complete the contract, thereby leaving to the township commissioners the right to select the bidder, who, under all the circumstances, was the "lowest and best bidder", to which the contract should be let.

DECREE NISI.

Ordered, adjudged and decreed, that the bill in equity be, and the same is hereby dismissed, and that each party pay its own costs.

J. D. Farnham, W. A. Valentine, for plaintiff.
A. Salsburg, A. P. Conniff, for defendants.

Court of Quarter Sessions of Luzerne County.

COMMONWEALTH *v.* DENNISON.

Criminal law—Trial—Character of defendant—New trial.

In trial of one accused of crime, reference by district attorney, even though by indirection, to failure of defendant to offer witnesses to previous good character, is not justified, and where Court has denied request of counsel for withdrawal of juror, and defendant is convicted, new trial will be awarded.

Motion for new trial, and in arrest of judgment. Quarter Sessions, Luzerne county. No. 4, November Sessions, 1916.

O'BOYLE, J., April 5, 1918.—In the above entitled case, counsel for defendant has presented nine reasons for a new trial and in arrest of judgment; but, after long and careful consideration, we are satisfied that the only reason entitled to serious consideration is the sixth, which reads as follows:

“The Court erred in refusing to withdraw a juror, for and on account of improper remarks made to the jury, by the district attorney, in his closing address.”

During the progress of the argument of the district attorney, at several points, counsel for defendant entered his objection of record, and, at its conclusion, the following motion was presented to the Court:

“Upon the conclusion of the closing argument of the district attorney, and before the charge of the Court, defendant moves the Court to withdraw a juror, for and on account of improper remarks made by the district attorney, to which, in each case, counsel for defendant took an exception.”

This motion having been denied by the Court, the matter now comes before us, to ascertain whether or not we were in error in refusing to withdraw a juror, and, by so doing, prejudiced the rights of the defendant.

The case was vigorously prosecuted, and vigorously defended, and doubtless many things were uttered on both sides, which were not calculated to create the impression that justice was being dispassionately and calmly administered; and yet, if we could bring ourselves to believe that no injury had been done the defendant by the district attorney, wherein he referred to the

means whereby the defendant could create a reasonable doubt, viz., by offering evidence of his previous good character, we would not disturb the judgment of the jury, because of the nature of the crime charged, and the public scandal which must inevitably be created by it, through the character of the testimony which must be offered in support of the guilt of the accused.

A new trial is decidedly to be regretted, because it only tends to the derogation of public morals; but, notwithstanding our personal feeling in the matter, and our regret that this whole subject must be again rehashed, the safeguarding of the rights of persons accused of crime, and the pursuit of the pathways which lead to the ends of justice, are too sacred to permit the abhorrent aspects of the case to stand in our way, and deflect us from our course.

Since the argument of this case before the Court in banc, it has frequently been under discussion, at meetings held by the said Court, until finally, it has been adopted as its unanimous opinion, that a new trial should be granted, because, it is the established and inviolable rule of law, that the character of a person accused of crime is not a fact in issue, and the State cannot, for the purpose of inducing belief in his guilt, introduce evidence tending to show, in the prisoner, a tendency or disposition to commit the crime with which he is charged, unless the defendant himself, first presents evidence of his previous good character. And the previous character of the defendant cannot be attacked by the prosecution, by argument or otherwise, unless he opens the way by an attempt to prove his good character. Whereupon, it is competent for the Commonwealth to disprove the existence of the character claimed to be in the possession of the defendant.

It is stated in Vol. 2, of Trickett's Criminal Law, at page 957 (first edition) that—

“The previous character of the defendant has no bearing whatever on his guilt, unless he chooses to put it in evidence. If he does not do this, the Commonwealth cannot offer proof that his character is bad. Nor can counsel for the Commonwealth, on argument to the jury, advert to the omission of the defendant to call witnesses to prove his good character. “To permit an inference of bad character to be argued,” says Dean, J., “because he has not adduced evidence of good character, is a palpable evasion of a well-settled and humane rule.

"Prisoners are not to be convicted because their past lives indicate they are capable of committing crime, but because the proof shows beyond a reasonable doubt that they committed the particular crime charged in the indictment.

"Until they raise the question of previous character, the Commonwealth cannot, either by evidence or argument, refer to it."

It was said in the case of the Commonwealth *v.* Weber, 167 Pa., page 157, that—

"Upon a trial for murder, it is improper for the district attorney to attack the character of the prisoner, not from the evidence, but by inference from the fact that the prisoner had called no witnesses to testify to good character; such an impropriety, however, is no ground for reversal, where no objection is made to it at the trial."

Of course, the inference to be drawn from this quotation, which has been called to our attention by the district attorney, is, that if proper objection had been made, and exception taken at the time, by defendant's counsel, to the statement of the district attorney, "that the prisoner had called no witnesses to testify to good character," it would be ground for a reversal, and that a new trial would have been granted.

There is nothing which we can find in the text books, nor in the decisions of our courts, which justify, even by indirection, any reference by the district attorney, to the failure of the defendant to offer witnesses to his previous good character; and when such reference has been made, we are convinced that it is error to refuse to withdraw a juror, when requested so to do, and, in the event of conviction, the only remedy left to safeguard the rights of the defendant is to grant him a new trial.

The remarks vigorously complained of by defendant's counsel, taken down at the time by the court stenographer, are as follows: By the district attorney, *inter alia*:

"Mr. Jones says it is our duty to show you beyond a reasonable doubt that this man is guilty of this crime.

"He is pinning his faith to the reasonable doubt.

"That is what lawyers do when they have bad cases in criminal court; they dwell at length upon the reasonable doubt. Now, gentlemen of the jury, there are a great many kinds of testimony that may create—serve to create reasonable doubts in the minds of jurors; for instance, testimony of good character. If a man

has had a good character in the neighborhood, that good character testimony may be thrown into the jury box, and may be considered as substantial testimony, for this reason, that if a man is charged with a crime, the chances are, for this purpose, that a man of good character in the community, may not have committed the crime; for instance, you are visiting some place, and the circumstances against you pointed to your guilt, what could you do? Why, you would send back home, and you would get your friends and your neighbors to come on to show—that you didn't commit the crime?

"No; but to testify that from the speech of the people in the community, in the neighborhood where you lived, that you are a man of good reputation.

"That is substantial testimony; that testimony alone in a case, may create what is called a reasonable doubt. There are other things which may create reasonable doubt."

At this point, defendant's counsel says: "I desire to take exception to all the remarks of the district attorney as to character."

In view of what we have already said, and that the formal motion to withdraw a juror, and continue the case, was denied, there is nothing left for us to do, but to sustain the sixth reason, and grant a new trial to the defendant.

F. P. Slattery, for Commonwealth.
E. C. Jones, for defendant.

IN RE ROAD IN NESCOPECK TOWNSHIP.

Highways—Vacating—Petition—Quashing—Act 1872—Verification.

Act April 9, 1915, P. L. 72, requiring verification of petitions and papers, may be invoked to quash a petition for vacation of a road, where the petition is unaccompanied by affidavit.

Quarter Sessions, Luzerne county. No. 292, April Sessions, 1916.

O'BOYLE, J., August 27, 1917.—A petition, not verified by affidavit, was presented to the Court of Quarter Sessions of Luzerne county, in the above entitled case on April 22, 1916, signed by a number of inhabitants of Nescopeck township, in which they pray the Court to appoint viewers to view and report, according to law, the vacation of a road, described as follows, and setting forth reasons for its vacation, viz.:

"A public road in the township of Nescopeck, this county, having its origin in public recognition and user beginning at a point in the public road from Zenith to Nescopeck near Snyder's grist mill, 532 feet from the nearest intersecting public road and extending thence southerly about one and one-half miles to a pub-

lic road from Tank to Nescopeck, at a point 130 feet from the nearest intersecting public road, has become useless, inconvenient and burdensome, and no longer serves any public demand by reason of changes in lines of public requirement and travel, and also by reason of two ford crossings of Nescopeck creek and two grade crossings of the Pennsylvania railroad, and the bad and inferior character of road repair materials available for repair in and along the location of said road."

Viewers having been appointed, they reported adversely to its vacation, in the first instance, for the reasons that the new road would end in a *cul de sac* and not at a place of public resort; and, upon exceptions being filed, it was recommitted to them, and, after reviewing the matter, the viewers reported in favor of its vacation, assigning as their reason for so doing, "that without bridges across the Nescopeck creek, it is inconvenient to the general traveling public."

After examining the proceedings, we must admit that the whole matter is involved in considerable doubt as to the theory upon which the viewers proceeded, and the law involved in the case.

We think that the supplemental report of the viewers should show more clearly the exact conditions upon the ground as to the terminus, and that the vacation of the road in question would leave another public road leading in a *cul de sac*, at a point which was not a public resort.

It is not contended that they had no right to vacate a road, notwithstanding the fact that its vacation would leave another road ending in a *cul de sac*, but their report should contain such information as would indicate that they had not entirely ignored the condition existing upon the ground.

But in view of the fact that the Act of April 9, A. D. 1915, P. L. 72, requiring verification of petitions and papers, had not been complied with, when the original petition was presented to the Court, we deem it unnecessary to enter into a further discussion of the questions involved, and allow the motion to quash the proceedings to prevail.

The Act referred to reads as follows:

"Section 1. Be it enacted, etc., that a judge of any court of record shall not, in any matter, case, hearing, or proceeding before him, receive or consider any petition, or paper in the nature of a petition, alleging any matter of fact, unless the petition or paper is duly verified as to such allegations."

In view of this positive language, we are unable to see how this petition, unverified by affidavit, can stand.

Now, therefore, August 27, 1917, the motion to quash the proceedings is allowed, and the proceedings are hereby quashed.

G. J. Clark, for petitioners.

W. A. Valentine, for exceptants.

COM. OF PENN'A *v.* DORAN *et al.**Criminal law—Indictment—Witnesses listed on indictment.*

Act 1860, P. L. 427, authorizes foreman of grand jury to administer the oath to witnesses whose names are listed on the indictment. A prosecutor is not eligible as a witness unless thus listed.

Rule to quash indictment. Quarter Sessions, Luzerne county. No. 169, February Sessions, 1918.

GARMAN, J., March , 1918.—The fifth reason in the motion to quash is that the name of a witness who gave testimony before the grand jury is not listed on the indictment. Edward J. Quinn, who is named on the indictment as prosecutor, was called before the grand jury. He was sworn and he testified. His name is not given upon the list of witnesses. These facts are not disputed.

By the Act of 1860, P. L. 427, the foreman of the grand jury is "authorized and empowered to administer the requisite oaths or affirmations to any witness whose name may be marked by the district attorney on the bill of indictment."

On a motion to quash for this same reason before Rice, P. J., in Commonwealth *v.* Wilson, reported in 6 Kulp, 40, the motion was sustained. The learned judge said: "We may assume, from what was said on the argument, that the witness was sworn by the foreman or some member of the grand jury, but if the grand jury had no authority to administer the oath, their action was as irregular as if they had examined witnesses without swearing them, which has been held sufficient ground for quashing the indictment."

It will be observed that the Court decides that the statute quoted confers power on the grand jury to administer oaths and affirmations only to such persons whose names are marked upon the indictment as witnesses.

The Commonwealth contends that because Mr. Quinn was the prosecutor and because his name was marked upon the indictment as prosecutor, he was entitled to be sworn as a witness and there was, therefore, substantial compliance with the statutory requirements.

We cannot agree with this view. Penal statutes are to be strictly construed and we are constrained to hold that when the prosecutor is to be used as a witness before the grand jury, his name must be marked as a witness on the indictment.

The rule to quash is made absolute.

E. Shortz, Jr., for Commonwealth.

F. McGuigan, W. L. Pace, for defendants.

Court of Common Pleas of Luzerne County.**KITCHEN v. LEHIGH VALLEY COAL CO.***Mines and mining—Safety passageways—Practicability.*

1. Rule 43, Anthracite Mine Law of 1891, as to passageway along gangways in mines, provides that "when found impractical" to make passageway on both sides of car tracks, holes of sufficient depth be excavated on one side, 150 feet apart.
2. Practicability of making passage of sufficient width for safety depends not on whether it is easy or convenient for the operator to do so, but whether it can be done with reasonable time and labor and with due regard to structural safety of the mines and workmen. Practicability must be determined in a reasonable sense and to be fairly feasible under all the circumstances.
3. "If found impractical" does not mean "found" by a jury but "found" by the reasonable judgment of the mine operator. Otherwise the governing of a hazardous enterprise would be left to the untrained judgment of a jury, and on a matter concerning which no two juries might rule alike.

*Motion for a new trial, etc. Common Pleas, Luzerne county.
No. 719, February term, 1912.*

FULLER, P. J., March , 1918.—This case has been thrice tried and should not be tried again except for coercive reasons.

The cause of action is alleged insufficiency of space between the mine track and the rib on the gangway of the mine, at the place where the plaintiff's son was caught by a mine car and killed, in alleged breach of defendant's duty as employer to furnish the employe with a safe place to work.

While such a duty might be based upon statute or common law, the case from the start has been treated by Court and counsel as if it involved only the breach of a statutory duty, namely, that which is defined in rules 43 and 47 of the Anthracite Mine Law of 1891.

Rule 43 provides, in substance, that every passageway used by persons in the mines, and also used for transportation of coal, etc., shall be made of sufficient width to permit persons to pass moving cars with safety or if found impracticable to make any passageway of sufficient width, then holes of ample dimensions and not more than 150 feet apart, free from obstruction, shall be made on one side of said passageway; and Rule 47 provides, that when cars are run on gravity roads by brakes or sprags (and the road in this case was such a road) the runner (meaning or imply-

ing thereby driver) shall only ride on the rear of the last car, and when said cars are run by sprag a space of not less than two feet from the body of the car shall be made on one or both sides of the track wherever it may be necessary for the runner or driver to pass along the side of a moving car or cars.

In our charge to the jury on the last trial, after quoting the rules, we stated without objection or exception the respective positions of the parties thus:

"Now that is the law of the case if we can reach a proper interpretation of it. The exact intention and proper interpretation of these rules which constitute the law of the case are not precisely clear and unambiguous in their present application. The defendant contends that by a proper construction its full duty was performed by having a sufficient passageway (and we say that it did have) on one side of the tracks, and if this construction were correct your verdict as a matter of law should be for the defendant. The plaintiff, on the other hand, contends that by a proper construction, if it was necessary for the boy to be where he was when hurt, there should have been a passageway of sufficient width there between the rib and the track of at least two feet clearance, unless this were found impracticable, in which case the safety holes would be required on one side, and if this construction be correct, the plaintiff may recover damages if the facts as you find them may warrant.

"The two rules must be construed together in effecting their central purpose, to make the passageway sufficient wherever it may be necessary for the runner to pass along the side of a moving car or cars.

"The space of not less than two feet mentioned in Rule 47 might not leave sufficient width. If so, then Rule 43 would require more than two feet, and (quoting from the rule) 'on one or both sides', means on both sides wherever it may be necessary for the runner to pass along both sides a moving car or cars, unless found impracticable, in which case the safety holes must be made and would constitute a compliance with the law."

On the first trial, the trial judge directed a verdict in favor of the defendant on the view that the defendant's duty under the rules was fully met by having sufficient space on one side of the track, with the safety holes shown by the evidence to exist.

The Court in banc, however, granted a new trial on the view

above set forth in our charge as that of the plaintiff, which was followed in the two subsequent trials.

On the second trial, the jury found in favor of the plaintiff against overwhelming and practically uncontradicted evidence establishing the impracticability of greater total width in the gangway, and on this ground a third trial was granted.

On this third trial, the case was submitted in practically the same manner as upon the second trial, to the jury who reached a verdict after adjournment of Court, sealed it up, separated, and on the following morning brought it in as follows:

"We render the verdict that the Lehigh Valley Coal Company is not guilty. We recommend that the space between the right hand track entering, and the rib from the point of the accident up to the point of the pillar, be widened to afford a safe passage-way for workmen on that side, to prevent a possible repetition of this accident".

The recommendation, of course, was surplusage.

The finding of not guilty was informal, and if the jury had not separated we should have sent them back to their room to agree upon a more formal deliverance.

In the presence of counsel for both parties, however, we asked the jury whether they meant to find in favor of the defendant, and were willing to have it so recorded, to which the jury responded in the affirmative.

Whereupon defendant's counsel moved that the foregoing should be recorded as a verdict in favor of the defendant, while plaintiff's counsel protested against its reception as any verdict at all.

We directed that it be recorded as a verdict in favor of the defendant.

Against the plaintiff's first, second and third reasons for a new trial we now hold that this deliverance was properly thus received and recorded.

The finding of "not guilty" was strictly responsive to the issue made by the plea, and while the customary form would have been "in favor of the defendant", the infirmity, if it be such, was one of form and not of substance.

The finding of "not guilty" could only mean "in favor of the defendant", and was not susceptible of any other possible interpretation.

It would be extremely farcical to nullify the whole long trial on such a ground, and such a ruling could only be followed by abrogation of the convenient practice to seal up verdicts.

The recommendation, while recorded, was no part of the verdict and should not be so regarded, but it invites consideration as indicative of the jury's thought concerning the questions involved.

One principal question was the practicability or impracticability of widening the gangway, and consequently of widening the passageway between the rib and the track; the main defense being impracticability, which the recommendation seems to deny, and we must, therefore, inquire whether in light of the recommendation the verdict of "not guilty" may not have been based upon a wrong reason, which should set it aside.

Two possible reasons may be suggested, for one or both of which the jury might have been led to decide the case in favor of the defendant, notwithstanding the conclusion of practicability, viz.: (1) that the deceased was guilty of contributory negligence, a conclusion sustainable on the evidence as submitted to the jury by the Court without objection or exception; (2) that the widening of the passageway between the track and the rib while practicable in fact was "found impracticable" in the exercise of a sound discretion by the operator, as submitted to the jury in the following language:

"Even if you find against the testimony, the practicability of widening the gangway, nevertheless if the defendant in the exercise of an honest, reasonable, intelligent judgment found it impracticable (because that is the language of the rule) honestly and intelligently deemed it impracticable, though mistaken, it would be absolved if it provided the safety holes.

"Did it exercise honest, reasonable, intelligent judgment, although mistaken?

"In case you should find that it was practicable, nevertheless did the defendant exercise an honest, intelligent judgment?

"Was it fairly justified in view of the circumstances existing at the time to leave the gangway of that width and the rib as it was in proximity to the track?

"If fifteen expert witnesses say it was impracticable, would not the defendant be justified in coming to the same conclusion?

"So we leave that question with you."

This seems to lack a proper discrimination between the question of wider gangway and the connected question of wider passageway between the track and the rib, but the excuse is later disclosed in the charge as follows:

"Now, if after consideration of all the testimony in the case you conclude it was not practicable to widen the gangway, that is to make it any wider than seventeen feet, then the space between

the rib and the rail at the place of the accident obviously could not have been increased without narrowing the space of about four feet on the other side of the track or five feet between the tracks, or both. But those spaces are barely big enough, and certainly not too big as it is. It has been proved customary to have the passageway between the tracks and not along the rib where there is a branch or turn-out railroad. Some discretion must be reposed in the defendant how to use the available space. Therefore if impracticable to widen the gangway, it was impracticable to have a safe passage between the rail and the rib at the place of the accident, and the third question which I have suggested on practicability must be answered in favor of the defendant, which would then be absolved from liability if it provided the safety holes specified in the law."

The plaintiff claims error in the Court's assumption of fact that the impracticability of widening the gangway established impracticability of widening the passageway between the track and the rib, but if we erred in that respect the recommendation of the jury demonstrates that it was not misled.

The subject was further submitted to the jury in our affirmance of defendant's eighth point, viz.:

"It was either within the statutory authority of the mine foreman, or within the reasonable discretion of the defendant, to determine whether it was practicable to make a passageway of sufficient width between the empty car track and the rib or side of the gangway in which the accident happened, and if found impracticable, in lieu of such a passageway to substitute on one side of it, as was done, holes of ample dimensions not more than 150 feet apart".

The subject was further submitted in our affirmance of plaintiff's second point, viz.:

"The defendant company was charged with the statutory duty of maintaining at the point of the accident a passageway or passageways of sufficient width to permit persons to pass moving cars with safety and accessible at all times from any point on the gangway where such persons' duties might require them to be, unless found impracticable"; and further, in our affirmance of plaintiff's fifth point, viz.:

"The determination of the question as to whether or not it was practicable to make the passageway of sufficient width to permit persons to pass moving cars with safety, depends not upon the question whether or not it was easy and convenient for the company so to do, but whether it could have been done with a reasonable amount of time and labor and with a due regard to the safety of the mines and the workmen therein"; to which he answered:

"We think that is a reasonable, fair definition of practicability, fairly consistent with the definition which I have already given,

namely, that practicability does not mean possibility on the one hand, nor does it simply mean superior convenience on the other hand. It must be interpreted in a reasonable sense, feasible, fairly feasible in the light of all the circumstances, safety of the mines and other considerations which are proper".

Roughly speaking, the gangway was seventeen feet wide at the place of the accident, and this space at that place was distributed two feet between the track and the rib on the side of the accident, three feet between the rails of each track, five feet between the two tracks, and four feet between the track and the rib on the other side. The distances, however, approaching and leaving the place of the accident, were not uniform but diminished below the figures stated.

We think that the proved facts and the recommendation of the jury eliminate from the case any complaint based upon a matter of distributing the space, and leave for consideration only the propriety of reference to the sound discretion of the operator.

In the sixth and ninth reasons for a new trial, the plaintiff complains that the test of liability was practicability in fact and not practicability within a sound discretion.

If this complaint be correct, a new trial should be granted, because the verdict may have been controlled by the consideration.

The plaintiff insists that defendant's liability depends upon the absolute fact of being practicable or impracticable in the judgment of the jury, and not upon the qualified fact of being so "found" in the judgment of the operator.

But this contention takes away all significance whatever from the word "found" which the statutory rule contains, and fails to give reasonable regard to the requirements of coal mining.

It would be unfortunate, indeed, if an enterprise affected with such dangers and difficulties, perplexities and problems, must be governed by the untrained judgment of a jury on matters concerning which no two juries might reach the same conclusion, instead of by the trained judgment of the operator, which if honestly and intelligently, though mistakenly formed, ought to be final.

If the judgment of the jury can over-ride the judgment of the operator respecting the practicability of proposals connected with the mining of coal, the entire operation might be thrown out of joint. Immunity from accident in one direction might create liability of accident in another direction.

Less than five feet between the tracks or less than four feet on the other side, permitting greater space between the track and the rib at place of accident, might lead to an accident between the tracks or on the other side.

It does not seem fair thus to set down the operator between the devil and the deep sea.

If the exigencies of the mine and the requirement to support the surface lead the operator to the honest conclusion that the gangway may not be widened, it seems to follow that the distribution of available space must likewise be left to his honest discretion.

The contrary view might help the plaintiff, but it might harm the case of the next man who comes along with an accident for negligence.

We think that the word "found" in the statutory rule has an intended and salutary function to perform which would be frustrated if the plaintiff's contention be correct.

Summarizing without further discussion the salient points of the case in the light of verdict and evidence, they are as follows:

(1) There was a sufficient, but barely sufficient, passageway between the two tracks, and between the out-track and the rib on that side of the gangway.

(2) There was not sufficient passageway between the in-track and the rib at the place of accident.

(3) The insufficiency there, however, could only be remedied by widening the gangway or by creating insufficiency at the other places.

(4) The weight of evidence as submitted to the jury showed impracticability of widening the gangway.

(5) Therefore the recommendation of the jury to increase the passageway at the place of accident must have been predicated upon the advisability and practicability of decrease at the other places.

(6) Hence, if the Court erred, as plaintiff contends, in charging that there could be no decrease at those places, the error did not harm the plaintiff as the jury disregarded the instruction.

(7) The verdict with the recommendation demonstrates the belief of the jury that while the distribution of available space should have been changed to increase the passageway at the place of the accident, nevertheless since the defendant had decided otherwise in the exercise of its honest and intelligent, though mistaken judgment in the matter, and had provided the safety holes required by statute, it was not guilty of negligence and should not be held liable for damages.

Out of deference to the forceful presentation of this case by the learned counsel for plaintiff, we have bestowed upon it an extraordinary amount of thinking and writing, by which we are led to the firm conclusion that in spite of mistakes incident to every trial, this verdict after the third trial, should not be disturbed.

Accordingly the motion for a new trial is denied.

J. E. Jenkins, A. L. Turner, for plaintiff.

P. F. O'Neill, for defendant.

SPARE v. SPARE.

Husband and wife—Divorce—Resumption of marriage relation—Alimony—Counsel fees.

Where A sues B, his wife, for divorce, alleging adultery, and B denies averment, A answering petition of B for alimony that B is living with another man; facts showing that several months after alleged adultery the two had resumed the marriage relation, that A is under sentence of court, not complied with, to pay respondent a certain sum for support, that respondent is entirely without means, etc., counsel fees and alimony will be decreed, suit to be stayed until compliance with order.

Divorce. Rule for alimony and counsel fees. Common Pleas, Luzerne county. No. 111, January term, 1918.

GARMAN, J., March , 1918.—The libel accuses respondent of adultery on or about April 26, 1917, and on divers other days and times before and since and avers that since said date respondent has given herself up to adulterous practices.

The respondent denies the allegations of the libel; and she presents a petition alleging that she is without means to defend herself in the action, and praying alimony and counsel fees.

The libellant answers that he should not be compelled to pay alimony because respondent is living with another man who supports her.

The testimony shows that libellant and respondent roomed together and resumed connubial relations on October 27, 1917, after the said date of April 26, 1917; that respondent is without kindred and friends; that libellant is under sentence of this court to pay respondent twenty dollars per month for support; that he has not complied with the order of the Court; that respondent is entirely without means; and that she is employed as a housekeeper for the man with whom she lives.

Libellant's own testimony shows such a condition of affairs between himself and his wife that we have no hesitation in inferring that she will require considerable funds to defend herself in this action.

We therefore direct that the libellant pay to the respondent two hundred dollars for counsel fees, fifty dollars—balance due on sentence of Judge O'Boyle, and twenty-five dollars per month alimony, first monthly payment to be made March 1, 1918, and subsequent payments on first of each and every month thereafter pending these proceedings. Proceedings to be stayed until payment of counsel fees and first payment of alimony.

T. M. Herbert, for libellant.
James McQuade, for respondent.

McDERMOTT *v.* McDERMOTT.

Husband and wife—Divorce—Cruel treatment—Lunacy of respondent.

Divorce prayed for on account of cruel and barbarous treatment was contested because of respondent being adjudged a lunatic and therefore not responsible. Held that where conduct complained of ante-dated the period of lunacy divorce will be granted.

Master's report recommending divorce and exceptions thereto.
Common Pleas, Luzerne county. No. 611, October term, 1917.

STRAUSS, J., February 18, 1918.—The libel bases the right to divorce upon cruel and barbarous treatment rendering the wife's condition intolerable, thereby forcing her to withdraw from the husband's house and family; and that this treatment occurred during a period before and after February 2, 1912, at divers times. There are other specifications of misbehavior in April, 1912, and in September, 1912, and the libel avers that to No. 564, March term, 1917, in this court the respondent was adjudged a lunatic by an inquisition *de lunatico inquirendo*; and that on March 12, 1917, said inquisition found the said respondent to be a lunatic without lucid intervals, and that such lunacy had existed for four years prior thereto, thus carrying the period of lunacy back to March 12, 1913.

The evidence adduced before the examiner fully warranted his finding and report of cruel treatment, etc., during a period beginning about one and one-half years after the marriage in 1893 and continuing to the date of the adjudication of lunacy and thereafter.

Exceptions are (1) that the respondent was not responsible for his acts on account of his impaired mental condition; (2) that responsibility for his acts as found by the master was not supported by the testimony; and (3) that the cruel and barbarous treatment found by the master ante-dated that averred in the libel.

While *Baughman v. Baughman*, 34 Superior, 271, has decided that the Act of April 18, 1905, P. L. 211, does not make hopeless insanity a ground for divorce, yet it recognizes the fact that under this statute and the Act of 1843, to which it is a supplement, a divorce proceeding may be begun for or against an insane person where there is cause for divorce prior to the insanity, that case holding that "divorce where there is cause for it is the plaintiff's right.

Exceptions dismissed.

John McGahren, for libellant.
F. P. Slattery, for respondent.

COM. *ex. rel.* DISTRICT ATTORNEY, *v.* KLEEMAN *et al.*
Boroughs—Officers—Election—Deadlock—Burgess—Deciding vote—
Quo warranto—Act 1836, P. L. 621.

1. At organization meeting of borough council a list of candidates received three votes each, the other three members dividing their votes. Burgess cast deciding vote in favor of the candidates receiving three votes each. On contest held that deciding vote under Borough Code 1915 effected valid election.
2. On *quo warranto* against those elected, held that under Act June 14, 1836, P. L. 621, Sec. 8, where title of several incumbents depends on same vote at same election, Court may include in one case all parties affected.

Information for quo warranto and motion to dismiss same.
Common Pleas, Luzerne county. No. 462, March term, 1918.

STRAUSS, J., May 7, 1918.—We are informed by the district attorney's suggestion that Swoyersville borough consists of three wards, each represented in the council by two councilmen; that P. J. Hayden is the burgess who presided over the organization meeting held, in pursuance of the Borough Code of 1915, on January 7, 1918, at 8 o'clock p. m., at which all six councilmen were present, and at which for the purpose of organization three councilmen voted for each of the following: Morris Kleiman for chairman of the council, Benjamin Speigle for treasurer, Joseph Charzonski for street commissioner, George Havrilla for chief of police, Barney Chimok for assistant chief of police, Abram Salsburg for solicitor; and that for each of said offices the remaining three councilmen voting against the persons already named, two of said councilmen voting for one other person and one councilman voting for another, whereby in each instance for the particular office named one of the defendants received three votes, while the other three were divided two and one for other persons; that the burgess presiding at the organization meeting according to the statute, claiming that the council was equally divided, in each instance voted for the respective defendant, thereby giving to him four votes out of the seven; whereupon the burgess declared the defendants elected to the respective offices. With reference to the secretary the information avers that Henry R. Miller was nominated and P. J. Hayden, burgess, then presiding, refused to entertain any further nominations for that office, and, without any election, unlawfully and illegally declared Henry E. Miller secretary of the council."

All of the defendants, excepting Miller, depend for their title to the office on a favorable construction of the Borough Code of May 14, 1915, Ch. 7, Art. I, Sec. 3: "The burgess shall preside over the organization meeting of the council, but he shall not vote thereat unless the vote of the council be equally divided." The right of each of these six defendants is a separate and distinct one. They are not concerned personally in the charge of misconduct against the burgess in conducting the election for secretary. Only Miller is affected by that action.

One of the grounds for the motion to dismiss is stated in these words: "This is an attempt to question the right to several distinct offices in one proceeding."

Com. *ex. rel.* *v.* Stevens *et al.*, 168 Pa. 582, establishes the doctrine that though the right to separate and distinct offices held by different incumbents cannot in general be inquired into in one proceeding, yet under the *quo warranto* Act of June 14, 1836, P. L. 621, Sec. 8, where the title of all the incumbents to the several offices, depends on the same votes at the same election, the Court may exercise jurisdiction that shall include in one case all of the parties affected in the same way and by the same facts. And Mr. Justice Mitchell stated that this doctrine results from the principle of equity practice, that the Court having jurisdiction of the subject matter of the controversy, shall include all the parties similarly affected and make a final determination of the whole.

We, therefore, suggest to the district attorney that he apply for leave to amend the information by striking from this record the name of Henry E. Miller as a defendant, leaving the controversy affecting the office of secretary for future consideration if the Commonwealth shall deem it proper to file a separate suggestion.

As to the remaining six we are of the opinion that an occasion arose in the course of these elections when the vote of the council was equally divided and when the burgess had the right to exercise his statutory privilege of voting. What is commonly called a deadlock existed. For example: Morris Kleiman had received three votes for chairman, John Sanko received two and Joseph Lustak had received one. The council was thus equally divided between electing and refusing to elect Kleiman. That those opposed to his election were themselves inharmonious and divided

in their votes did not change the situation on the main question whether he should be elected.

The purpose of the statute is to prevent a deadlock on any question involving the organization in a council made up of an even number of members. The fourth section of Chapter 7, Article 1, provides if the council of any borough shall fail to organize within ten days from the time prescribed in Section 1 of this Act, the Court of Quarter Sessions, upon the petition of ten taxable inhabitants, verified by the affidavit of five of the petitioners, shall issue a rule upon the delinquents to show cause why their seats should not be declared vacant. The rule shall be returned not less than five days from the time of its issue, and after the hearing the Court may declare the seats of such delinquent council vacant and appoint others in their stead who shall hold office for the unexpired term."

We must construe this legislation so as to avoid the necessity of removal of councilmen. The fact that only one ballot was taken is not an essential element in considering whether a deadlock existed or whether there was an equal division. The burgess's right to prevent the deadlock and to avoid the necessity of applying to the Court for the removal of the entire council, was just as complete after a first ballot as it would have been after twenty or more or less, and it was just as complete on the first day as it would have been on the last of the ten days within which the council is required to organize.

Until the district attorney shall have amended his information no formal decree will be made.

Leave is given to the district attorney to amend the suggestion and prayer in the information.

James McQuade, B. R. Jones, for petitioners.
Abram Salsburg, for defendants.

SNYDER *v.* HARRIS.

O'BOYLE, J., August , 1917.—Common Pleas Luzerne county. No. 474, May term, 1917.

Certiorari—Summons—Record of justice.

Where transcript of justice does not show upon whom summons was served, no record of plaintiff appearing and submitting himself to the jurisdiction, or the time judgment was entered, proceedings will be reversed on certiorari.

J. P. Lord, for defendant.

OTIS *et al.* v. SCHOOL DISTRICT.

Common schools—Bond issue—Contract—Sinking Fund to Trust Co.

A school board advertised for bids for a bond issue, and accepted bid of plaintiff, together with check for \$200 called for in advertisement. Said advertisement had recited amount of issue, interest rate, term, etc., but failed to state that board had made contract with trust company to receive taxes of district and apply same on interest and principal of bonds. Bidder reserved right to have bonds approved by attorney. Attorney refused acceptance of bonds because of no authority of board to execute such contract with trust company. Plaintiff sued to recover the \$200 check.

Held, that as bondholders might eventually be obliged to look to trust company instead of to school board for payment, and that matter might also involve solvency of trust company, refusal of plaintiff to buy the bonds under a contract only partially made clear, was justifiable, and reservation of plaintiff as to examination and approval of bonds, was protection.

Referee's report and exceptions. Common Pleas, Luzerne count. No. 128, December term, 1910.

STRAUSS, J., February 21, 1918.—This action was brought to recover the sum of two hundred dollars which the plaintiff, a bond-buying house, had deposited with defendant in connection with a bid for the purchase of \$50,000 of defendant's new issue of four and a half per cent. bonds.

The advertisement invited bids accompanied with a certified check for two hundred dollars to secure compliance with the bid if accepted, and to be returned if the bid were not accepted.

The advertisement also contained a description of the number, maturities, rate of interest and other conditions of issue affecting the bonds, but no reference to the fact that the school district had, simultaneously with the resolution authorizing the issue, adopted another resolution, and in pursuance of it entered upon a contract appointing the People's Savings & Trust Company of Hazleton fiscal agent to receive from the tax collector of the district, as the taxes are collected, all funds to be used for the payment of the principal and interest on the bonds, the cash in the hands of the said trust company to be specially deposited at current rates of interest as paid to the bank's regular savings depositors, and said funds to be applied by the said bank to the payment of the principal and interest as the same accrues.

In consequence of this resolution and contract there was inserted into the bonds a clause subjecting them to all the provisions of the contract with the trust company, assigning to that company for redemption of said bonds all moneys arising from a certain sinking fund tax specially levied to provide for the redemption of the bonds.

The plaintiff submitted a written bid which contained, *inter alia* the following condition: "If we are awarded the bonds you are

to furnish us prior to their delivery a full and complete transcript of proceedings sufficient to evidence the legality and regularity of the issue to the satisfaction of our attorneys".

The plaintiff being the best bidder was awarded the bonds, and was furnished with "a full and complete transcript of proceedings, which included copies of the several resolutions already referred to and of the form of the bonds".

Squires, Sanders and Dempsey, plaintiff's attorneys, having offices in the city of Cleveland, refused to approve of the bonds for two reasons: (1) because no statute in Pennsylvania authorized a school district to enter into such a contract with the trust company as was recited in these bonds, wherefore without statutory authority the attorneys seriously questioned the right of the directors to make such contract; and (2) even though the school district might lawfully make such a contract, the attorneys were of the opinion that under the circumstances of the case the bonds were payable only from money raised by the tax which would be deposited with the trust company under the contract.

Thereupon the plaintiff refused to accept the bonds and demanded a return of their certified check, which defendant declined, contending that the bond issue and the contract with the trust company were legal, and that the plaintiff's refusal to comply with their bid was unjustifiable.

The plaintiff consequently brought this action to recover the amount of the check. The case having been referred to John H. Bigelow, Esq., he reported in favor of entering judgment against the defendant, who filed the exceptions now before us.

The learned referee has very fully and convincingly considered and disposed of the legal questions. He did not nor can we find that the action of the plaintiff in refusing to comply with their bid was capricious, or that their attorneys in refusing to approve of the bonds acted capriciously and upon grounds without legal merit.

Notwithstanding *Blamire v. The Borough of Parsons*, 17 Luz. Leg. Reg. 417, which sustained the legality of a contract similar to that between this school district and the trust company, it may still be considered as open to doubt not resolved by that case, whether by the payment of the sinking fund tax to the trust company under the contract the school district would not relieve itself of the indebtedness upon the bonds *pro tanto*. It is conceivable that such a judicial construction might be given to the clause contained in the bonds subjecting them to the terms of the contract whereby the bondholders could not under all circumstances look to the school district but might have to look to the solvency of the trust company for their security. So far from holding the action of attorneys in giving the opinion as being capricious and unsupported by law, it seems to us to have been

the only safe and natural opinion possible under the circumstances. To demand of this bidder that they accept these bonds upon a bid made in pursuance of an invitation containing no reference to the objectionable clause or objectionable contract, would be to impose upon them a contract to which they never knowingly assented. Against such a contingency the reservation in the bid that the legality and regularity of the bonds should be to the satisfaction of the attorneys was a complete protection.

Exceptions to the referee's report dismissed, and the prothonotary directed to enter judgment in favor of the plaintiff upon the report.

B. R. Jones, H. B. Payne, for plaintiff.
J. R. Sharpless, for defendant.

JOHNSTON *v.* HENNAN *et al.*

*Common schools—One acting in dual capacity for school district—
Injunction—Public policy.*

Sound public policy forbids that a person should act in the dual capacity of salaried solicitor for a school district while acting in the capacity of treasurer and tax collector for the same, and injunction enjoining school board from paying salary as attorney to one who is tax collector and treasurer for the district will be awarded.

Trial on bill, answer and replication. In Equity. No. 1, June term, 1916.

FULLER, P. J., November 2, 1916.—This sworn bill filed May 8, 1916, by a qualified elector and taxpayer of the Wilkes-Barre township school district against the school board thereof, avers that the latter, in December, 1915, elected for the current year on a salary of \$600, as solicitor, the duly acting and qualified treasurer and tax collector of the district, thus creating a dual capacity in which it may be necessary for the solicitor to act and advise against himself as treasurer and tax collector, contrary to professional ethics and public policy. The prayer is for an injunction to restrain payment of the said salary. A preliminary injunction was granted, which was continued until final hearing and is still operative. A demurrer to the bill was filed July 6, 1916, in substance that the bill did not show any right to the relief. This demurrer was over-ruled and the defendants were directed to file answer, which they did on August 30, 1916.

The answer admits every averment of fact in the bill and accordingly the case is now submitted on the pleadings without further evidence.

FACTS:

1. The first paragraph of the bill, admitted by the first paragraph of the answer, is true, viz.:

1st. The plaintiff is a citizen, qualified elector and taxpayer of the township of Wilkes-Barre, Luzerne county, Pennsylvania, and of the school district of the township of Wilkes-Barre, of which the above named defendants are school directors.

2. The second paragraph of the bill, admitted by the second paragraph of the answer, is true, viz.:

2nd. The said defendants, James Hennan, Patrick F. Cunningham, Patrick Cunningham, Michael McHugh, Anthony Toole, Bernard Johnson and James Flynn, are the duly qualified, serving and acting school directors of the Wilkes-Barre township school district, and the defendant, James Hennan, is president of said board of school directors, and the defendant, Patrick F. Cunningham, is secretary of said board of school directors, and Patrick Cunningham is treasurer of said school district.

3. The third paragraph of the bill, admitted by the third paragraph of the answer, is true, viz.:

3rd. On or about the first Monday of December, 1915, said defendant school directors elected M. F. Shannon, a member of the Luzerne county bar, as attorney for said school district, for the current year, at an annual salary of \$600.

4. The fourth paragraph of the bill, admitted by the fourth paragraph of the answer, is true, viz.:

4th. The said Shannon, in the year 1913, was duly elected treasurer and tax collector of the said township of Wilkes-Barre, and began his office as such in 1914, and was the duly acting and qualified treasurer and tax collector of the said Wilkes-Barre township school district, at the time of his election as attorney or solicitor for said school district.

5. The fifth paragraph of the bill, admitted by the fifth paragraph of the answer, is true, viz.:

5th. As tax collector of said school district, it is the duty of said Shannon, during the current year, to make settlement with and pay over to the said school district of the township of Wilkes-Barre, from time to time, taxes collected by him.

We state the following conclusion of

LAW:

1. A sound public policy and a proper view of professional ethics, forbid that a person should act in the dual capacity of salaried solicitor for a school district while acting in the capacity of treasurer and tax collector for the same.

2. The plaintiff is entitled to an injunction as prayed, and the preliminary injunction heretofore granted should be made perpetual.

For justification of these conclusions, we refer without further discussion to our opinion over-ruling the demurrer.

W. A. Valentine, for plaintiff.
M. J. Mulhall, for defendants.

ZADWICK v. LEHIGH & WILKES-BARRE COAL CO.

*Workmen's compensation—Referee—Reversal by board—Hearing de novo
—Causal relation of injury with death—Evidence.*

A, quitting work in mines, complained to companions that he was injured in lifting rocks; had difficulty getting home; lay in a field where he told his daughter he had hurt himself lifting; confined to bed till his death three weeks later; two physicians found tenderness in back as if from sprain; death reported as meningitis; difference of medical opinion as to whether strain could have caused the disease and death. Referee, under Workman's Compensation Act, awarded damages. Board reversed referee. *Held*, that evidence was sufficient to show causal relation between injury and death to warrant hearing *de novo* under Act 1915, P. L. 753, Sec. 421, the issue being one of fact.

Appeal from Workmen's Compensation Board reversing the findings of the referee and denying compensation. Common Pleas, Luzerne county. No. 90, July term, 1917.

STRAUSS, J., April 2, 1918.—Joseph Zadwick, the husband of claimant, was employed by the defendant at one of its collieries in Plymouth. On July 12, 1916, he was ill on his way home and died on August 7 from meningitis. It is claimed that this disease was the result of a sprain, which it is alleged he suffered in the course of his employment on July 12.

The referee upheld the claim and the specific ground for the appeal to this court is to be found, if at all, in action of the board whereby it "denied compensation to the claimant without having granted a hearing *de novo*," in violation of Sec. 421, Workmen's Compensation Act, P. L. 1915, p. 753, under which the board on an appeal is limited in power to an affirmance of the referee's award or to granting a hearing *de novo*.

Referring, however, to Sec. 420, we find that where an appeal is based upon an alleged error of law, the board has the power either of sustaining, reversing, or modifying the referee's award as it shall deem proper.

Under Sec. 425 an appeal from the decision of the board on matters of law to the Court of Common Pleas is given, and there is no appeal to such court on matters of fact.

Under these sections it has been decided that both the board and the courts have power to examine the testimony that was taken before the referee, and to ascertain as a question of law whether there is any evidence sustaining the award. South Side

Trust Co. *v.* Winter Garden Co., 65 Pa. P. L. J. 632; Yalch *v.* Jones, 3 Dept. Rep. 2185.

The referee having found in favor of the claimant and the board having reversed that finding without granting a hearing *de novo* under the 421st section, we must assume that the board's action was taken under Sec. 420, and that judgment for defendant was entered because in the opinion of the board there was no legal evidence to sustain the report of the referee. It thus becomes our duty to limit our attention to the evidence which accompanies this appeal.

As we have already said the deceased at the end of the working day on July 12, on his way home was ill, and died on August 7 of meningitis. There was no evidence by an eye witness to any accident or injury. The deceased worked somewhere near the foot of slope No. 6, and on the way out of the mine stopped at the foot of the slope with other employes "waiting to get a ride out." After waiting some time, it was decided that "everybody walk up." The witness, Sylvester Yanasheski, testifies that "When we got to the next stop, some no walk up and Joe (the deceased) he stayed there, too," saying, "I can't walk no more; I feel like I been broke, * * * he said he was lifting rock and that his back was broke * * * not lifting very big rock," and then the witness proceeded on his way, leaving the deceased at that point. On cross examination this same witness testifies that decedent said:

"He was not lifting very big rock but just said I am tired * * * just tired * * * I am tired lifting rocks. I feel I lift some and something broke."

Another witness, a son-in-law of the deceased, testified that the deceased on his way home came to the witness' door and asked for a drink of water, saying: "I lift big rock and crack my back." Proceeding towards his home, his illness probably increasing, he lay down in the field where his child, Mary, saw him and reported to her mother, who went to his assistance and to whom he said: "I can't walk any more; I sprained myself; I can't walk." She describes him as "sweating awful when we got him home we got him a drink of water; I helped to wash him and he wouldn't walk upstairs; I put him on the couch and he lay there all night, having fever and chills, his stomach swelling up." Not until July 17 was a physician, Dr. F. W. Roberts, consulted, and he testifies:

"I did not make a diagnosis; I was there one evening, but he was complaining of a good deal of pain and prostration, and he told me at that time that he had sprained himself while at work in the mines."

This physician did not again see him. He examined him then, found he was tender about the back, tenderness that came from a

sprain, but in response to a question, "whether or not, in your opinion, the meningitis could possibly have resulted from the accident he claimed to have suffered from a sprain?" he answers, "I think not." In his opinion the soreness was not due to spinal meningitis, but he is not satisfied that it was due to a sprain and finally states that he does not know to what it was due.

On August 4, Dr. J. F. Connole, another physician was called, to whom also the history of the case was given by the patient as "a sprain, with complaint of tenderness in the abdomen * * * of his back", and this physician speaks of a lump on the right side of his head. He gives it as his opinion that the deceased died from meningitis. He issued a certificate on September 15 in the following form:

"To Whom It May Concern:

"This is to certify that I attended Joseph Zadwick in his last illness and can truthfully state that his death was preceded by an injury."

He is very cautious in his reply to the question of whether the injury contributed to the death, saying in the form that he adopted in the certificate, "It must have contributed to his death because it preceded it;" but further on states: "I couldn't state the exact cause of the meningitis, but I know the meningitis followed an injury and the injury preceded the meningitis, * * * that meningitis results, as a rule, from an infection, and that an injury was more likely the cause of death" (page 5).

Dr. Geist, probably called on behalf of the defendant, expresses the opinion that it is hardly possible that the deceased would have been liable to chills and fever right after a sprain, and that chills and fever would not be symptoms of meningitis, but that meningitis would result from sprain.

Dr. Drake was called but his testimony throws no light on the subject.

Such was the evidence submitted to the referee and subsequently to the board. Upon it the board concluded (see opinion of Commissioner Scott) that "we have carefully read the testimony offered to prove the accident. All the direct statements made to this effect are hearsay, without sufficient corroborating circumstances necessary to meet the burden of proof. In addition the medical testimony in the case as to the cause of death and of the relation between any accident and the death, is conflicting, uncertain and unsatisfactory. Failing to establish, in the opinion of the board, such a causal relation between any injury and the death as to convince the board that the injury was the proximate cause of the death, we are constrained to set aside the finding and the award made in this case and the appeal is sustained."

The result is apparently based on two considerations: (a) that the fact of accident (sprain) depends for proof on uncor-

robolated hearsay; and (b) that all the evidence taken together does not establish a causal relation between the accident and the death.

As to (a): An illuminating essay on hearsay evidence as affected by the Workmen's Compensation law written by Commissioner Mackey and promulgated as instructions to referees is reported to 2 Dept. Rep. 2636. Therein it is clearly shown that the Act does not enlarge the law of evidence, and that a claim for compensation will not be sustained unless it shall be established by legal evidence. This, in our opinion, is a correct interpretation of the statute. By the light of this rule we shall examine the evidence and the authorities applicable to it.

The declarations of a person concerning the cause of a supposed injury to him made shortly after it is claimed to have happened are admissible, though hearsay, as part of the *res gestae*. *Smith v. Stoner*, 243 Pa. 58; *Tomczak v. Coal Co.*, 250 Pa. 325. Such declaration made to the wife and subsequently to a physician long after it might strictly be regarded as *res gestae* was admitted without producing reversal in *Van Eman v. The F. C. Co.*, 201 Pa. 541.

Insurance Co. v. Mosly, 8 Wallace 397, in line with the foregoing presents a case in which the Supreme Court of the United States stated: "The declarations of the party himself are received to prove his condition, ills, pains and symptoms whether arising from sickness or an injury by accident or violence. If made to the medical attendant they are of more weight than if made to another person; but to whomsoever made they are competent evidence. * * * The *res gestae* are the statements of the cause made by the assured almost co-temporaneously with its occurrence and those relating to the consequences while the latter subsisted and were in progress. Where sickness or affection is the subject of inquiry the sickness or affection is the principal fact. The *res gestae* are the declarations tending to show the reality of its existence and its extent and character. The tendency of recent adjudications is to extend, rather than to narrow, the scope of the doctrine. * * * It is impossible to tie down to time the rule as to the declarations. We must judge from the circumstances of the case. We need not go the length of saying that a declaration made a month after a fact would of itself be admissible, but if, as in the present case, there are connecting circumstances, it may even at that time form a part of the whole of *res gestae*."

In *Wolford v. Geisel Moving & Storage Co.*, recently decided by the Workmen's Compensation Board, not yet reported but brought to our attention in connection with a supplemental brief, where evidently the accident was not proved by an eye witness, the chairman of the board, Commissioner Mackey, in summariz-

ing the evidence upon which the fact of injury was found, stated:

"We have him (the deceased) complaining to his wife, to his employer and to his physician, that he had injured himself while thus employed. We have the fact of his previous good health and ability to work immediately before this particular employment. * * * In coming to this conclusion (that the referee's report should be sustained) we have not given any undue consideration to the statement made by the deceased, although in each instance they were made in our judgment at a time when there was no possible thought in the deceased's mind of fabricating a story to be subsequently useful to himself or his dependents. The manner in which the deceased described his injury, as well as the persons to whom he related these occurrences, naturally raise in the mind of a disinterested reader of the testimony, a strong feeling in favor of their truth." Citing in support of the opinion *Van Eman v. The Company*, 201 Pa. 537.

So here, though no one saw an accident, the deceased complained of sprain in the back at the foot of slope at the second station in the slope beyond which he stated he could not walk; on the way home when getting a drink of water; at a point in the field where he had lain down some distance from his home; at his home where he refused to go upstairs; five days later to a physician who was then for the first time called in but who made no diagnosis and has not testified to the presence of symptoms indicating meningitis, but who accepted the explanation made by the patient of the cause of his condition; and finally three days before his death to another physician who was called, saw him twice and testifies that: "From the history that the patient gave me he was suffering from sprain," but when asked: "In your opinion, what did he die from," he answered: "I was called upon and was the last physician to see him. I had to make a diagnosis for the death certificate, and I saw him on the day he died, and I think he died from meningitis."

It being a well-known fact that workmen in the mines are frequently employed at isolated points where accidents may and frequently do occur unwitnessed by anybody but the victim, it would be a harsh rule that would require corroboration of declarations that are strictly *res gestae* when there is no outward evidence of accident, but when the declarations are made, as is stated by Commissioner Mackey in *Wolford v. The Storage Co.*, *supra*, "at a time when there was no possible thought in the deceased's mind of fabricating a story to be subsequently useful to himself or to his dependents."

We are of the opinion that there was sufficient evidence in this case of some happening to the deceased in the course of his employment on July 12, from which he drew a natural inference leading to the declaration that he had sprained his back.

(b) There is greater difficulty about the second proposition whether there is sufficient evidence to find a causal relation between the occurrence on July 12 and the death on August 7.

We agree that the evidence, such as it is on this point, is as stated by the opinion of the commissioner, "uncertain and unsatisfactory," but we have carefully examined it and we cannot conclude there was no evidence whatever to submit upon the subject. Unless we do so conclude the decree of the commission cannot be sustained. Dr. Geist testified positively that meningitis would result from sprain (page 9). Meager though this evidence be, the referee believed it sufficient to justify him in finding a causal relation. It is, of course, possible that the sensation from which the deceased inferred a sprain, was in fact the beginning of meningitis, and that if this were so, the continuity of illness after July 12 to the time of death would furnish no just basis for inference of injury. On the other hand, the fact that five days after decedent's illness began the first physician called failed to diagnose so serious and well-known an illness as meningitis, would tend to strengthen the inference of injury. And the failure of any of the physicians to testify that meningitis could not have resulted from such an injury, and the admission of at least one that it is within the bounds of possibility, brings us to the conclusion that the opinion of the board against the causal relation because the evidence of the physicians was conflicting, uncertain and unsatisfactory, presents a definite case where the finding is one of fact and not of law, and therefore that the board ought to have ordered a hearing *de novo*.

Claimant's appeal is sustained; the order of the Workmen's Compensation Board setting aside the findings and the award of the referee is reversed, and the said board is now directed to grant a hearing *de novo* in accordance with Section 421 of the Workmen's Compensation Act, 1915, P. L. 753.

Roger Dever, for plaintiff.

E. C. Jones, Arthur Hillman, G. S. McClintock, for defendant.

MORRETT *v.* FIRE ASSOCIATION OF PHILADELPHIA.

WOODWARD, J., January 11, 1917.—Rule for judgment for want of a sufficient affidavit of defense. Common Pleas, Luzerne county. No. 336, October term, 1916.

Insurance—Insurable interest—Disclaimer.

Where after destruction of property by fire, insured institutes action for insurance, affidavit of insurance company that subsequent to assignment to plaintiff of policy he had, in action of ejectment against him, filed a disclaimer of title to the premises is good. An insurable interest at the time of destruction of property is as necessary as at inception of contract of insurance.

J. T. Lenahan, for plaintiff.

H. B. Hamlin, for defendant.

REILAY v. SARDONI *et al.*

Riparian rights—Stream—Dam and bridge—Damage to upper riparian owner.

1. Bill in equity at instance of A, upper riparian owner, to compel B, lower riparian owner, to remove bridge and dam across creek flowing through property of both, on assertion of damage to A's land, cannot be supported unless A shows actual and substantial damage or has reasonable ground of such apprehension.
2. Defendants, lower riparian owners, have right to change channel of stream on their own land and to fill up and change use of old channel, provided the channel substituted has sufficient capacity to take and vent the ordinary flow of water.

Hearing on bill, answer and replication. Common Pleas, Luzerne county. Sitting in Equity. No. 2, March term, 1915.

O'BOYLE, J., August 27, 1917.—The facts show that the plaintiff is the owner of a tract of land, with dwelling houses and out-buildings, on which he resides, situate on the northwesterly side of Wyoming avenue, and fronting thereon, in the borough of Forty Fort, and that the defendants are the owners of a tract of land on the opposite side of the avenue, with dwelling house and outbuildings, on which they reside, and that a stream of water, known as Abram's creek, has, from time immemorial, flowed, and now flows through the land of the plaintiff, for a distance of about twelve hundred feet, in a southeasterly direction, and, after leaving his land, passes under a bridge upon Wyoming avenue, known as the Stone Bridge, from whence it enters and flows for a short distance over and across the land of Robert Garrahan, and from a point on the southeasterly boundary line of said Garrahan's land, it enters upon the lands of the defendants, and from thence on to the Susquehanna river.

It is also contended that at some time within two years previous to the filing of this bill, the defendants constructed and are now maintaining a bridge across said Abram's creek, upon their land, about one hundred and fifty feet down the stream from the line of the land of the plaintiff, and that the piers and abutments of said bridge as placed and constructed by the defendants, narrow the channel of Abram's creek, and obstruct the flow of its waters. That at or about the time the bridge was constructed, they also obstructed and closed the natural channel of Abram's creek, at a point about twenty feet below said bridge, and diverted the waters of said creek from their natural and customary course, to the eastward of the natural channel, and caused and still cause said stream to flow for a distance of upwards of four hundred feet in and through a new channel.

It is further contended by the plaintiff that the closing of said natural channel and diversion of the waters of said creek into

said artificial channel by the defendants, have checked and retarded the flow of the waters of said creek.

It is also contended that at a time not precisely known to the plaintiff, but, as he avers, within six months prior to the filing of this bill, defendants constructed a dam to the height of about eight feet, upon their land, across the bed of Abram's creek, at a point about five hundred feet down said stream from the line of plaintiff's land, and that they continue to maintain the same, whereby the waters of said stream are dammed back and the free flow thereof obstructed and retarded.

All of these reasons are set forth by the plaintiff in different paragraphs of his bill, asking relief against the defendant for the alleged obstruction of the creek, and the backing up of the water upon the plaintiff's land, which, he claims, has greatly increased, because the level of the stream has been raised, and the rapidity of the flow of the current decreased; and that in consequence thereof, silt, culm and gravel, brought down by the stream from time to time, from higher lands (which always, prior to the alleged obstruction and damming of the stream by the defendants, were carried, on, through and by the natural force of the current) are now deposited and remain upon the plaintiff's land, filling up the bed of said creek from time to time and threatening your orator's land with overflow and inundation.

The defendants contend that so far as the paragraph relating to the channel, in plaintiff's bill, is concerned, they dug out a sufficient channel in the bed of the creek to take all the flow of water therein, and aver that they greatly improved the flow of water coming from lands of plaintiff. They also deny that there is any culm on the land of plaintiff as a result of anything which they had done to the stream, by either the erection of the bridge, the changing of the channel, or the building of the dam; but contend that if there is any culm on the land of the plaintiff, it is the result, and is due, in consequence of the mining rights granted by the predecessors in title of the plaintiff, or else comes from upper riparian owners, or through plaintiff's own acts, over whom defendants have no control.

The defendants also contend that plaintiff has suffered no damage by or from anything the defendants have done in and about the said creek; that there is very little culm or sediment in the creek on plaintiff's land, and that the damage arising therefrom, if any, is a mere trifle and entirely unsubstantial. At the most it is of a temporary character, and is caused by plaintiff's own acts in casting debris into the stream.

Counsel for the defendants, in his argument, states, that—"they concede that the Garrahan land and the Sardoni land owe a natural servitude to the Reilay land to give vent to all the waters

ordinarily and naturally coming to the Reilay line in the creek, and that Sardoni has no right to dam the waters back on the Reilay land."

The general proposition of law is, that "to entitle a person to injunctive relief he must establish as against the defendant an actual and substantial injury, and not merely a technical and inconsequential wrong entitling him to nominal damages only; and this is true whether such injury be single or continuous, or whether it be the subject of one act only, or of successive acts." See 16 Am. & Eng. Ency. Law (2nd Edit.), page 360.

In 22 Cyc., pages 760-61, it is stated that: "Injury to the complainant or plaintiff must exist, and it must be substantial in character in order to warrant a court of equity in granting an injunction whether prohibitory or mandatory." See also 203 Pa., page 474; 2 Blair Co., 283; 19 Montg. Co., 198.

It has been held that: "Where the damage is so very small, and the right so unimportant as to make the case a trivial one, equity will dismiss the bill." 22 Cyc., page 761.

The defendants contend that the rule "*de minimis non curat lex*", if it could ever be applied to any case, should be applied to this.

It is difficult to escape this conclusion. We have carefully gone over the testimony on both sides, and we are unable to find that there is more in it than an imaginary wrong, or the possibility of an injury.

DISCUSSION.

It appears that for two years previous to the institution of this action some of the obstructions referred to had been erected. The plaintiff, strolling over the land of the defendants to gratify his curiosity, discovered, a short time previous to the institution of this action, that there was a dam, five hundred feet below the bridge, which was erected by the defendants, a short distance from the public road and over which the plaintiff frequently passed. This was, as he says, according to the statement of Nicholas Sardoni, one of the defendants, of a temporary construction, to facilitate passage back and from Sardoni's house to his lands lying on the other side of the creek.

The change in the channel was made in order to improve the land of the defendant, and, under the testimony, it is impossible for us to discover where it in any manner impeded the flow of the water. It was, in our judgment, a proper improvement, made by the defendants, for their own advantage, upon their own land, without in any way interfering with the rights of the upper riparian owner, viz., the plaintiff.

The testimony of the engineer for the plaintiff is to the effect that the bridge had a tendency to retard the progress of the water.

The testimony of the two engineers for the defendants is to the effect that while there might be a possibility of retardation of the water, that neither the bridge, change of channel, or dam, in any material way affected injuriously the rights, or the lands of the plaintiff.

It is difficult for this Court to conceive how a person living as close as the plaintiff was to the defendants, could have failed to discover the injury which he complains of for so long a time as passed between the building of the bridge, the changing of the channel, and the erection of the dam, if the injury were substantial and that he never discovered it until he had stumbled upon it by chance in passing over the defendants land.

While much has been said in the various paragraphs of plaintiff's bill about the obstruction of the water, the silt deposited in the creek, and the backing up of the water, it is all confined, when analyzed, to the conditions existing in the bed of the creek, and there is no proof, nor could there be, according to the elevations, that the creek, by reason of any of the causes mentioned, at any time overflowed upon the fertile lands, or any lands of the plaintiff, and injured them, or caused him any loss or damage. And truly in this case may it be said, that if one were looking for a reason to find fault with his neighbor he could not well pick upon a more insignificant one.

It must be remembered that when the Susquehanna river overflows its banks, which is very frequent, its waters come back through this creek, and go back nearly to the foot of the mountain, over a mile away from Wyoming avenue—this dividing line between these properties—and whether the silt was carried back by such inundation we are at a loss to know; nor is there a scintilla of proof to show, in this case, that any substantial damage ever resulted to the plaintiff by any of the normal and natural floods that are carried from time to time through this creek and over or through this dam.

The dam, at most, was about two feet higher than the water below it in the stream; and, the water above it, held back by it, was far from the line of the plaintiff's land when the engineers saw it.

Any raise in the natural flow in the creek would carry this water over into a dam which was twenty feet wide, and ten feet of it broken and uncrowned, and this would occur long before the creek would overflow its banks upon the soil of plaintiff's property.

There is no proof to show how the silt or other deposits came into the stream. At certain levels it was almost stagnant, and had very little flow, as the figures offered by the engineers will show—about one foot in seven hundred feet. So that at low water, and when there were no freshets it could not be expected that there would be a very rapid flow of the water in the stream.

Therefore, it seems to us, that even in a suit at law, the Court would require the plaintiff to show that some damage had been done to him by reason of the improvement made by the defendants upon their lands, and that the silt and injurious substances, or even the water had overflowed upon the land of the plaintiff and caused him damage, either by injury to his crops, or by depositing some material upon the land that injured its fertility or productiveness. Nothing of this kind has been shown through the years that these obstructions have existed; and it will not do to say that these things—the erection of the bridge, change of channel and dam—threaten to do things which have never materialized.

Here follows summary of defendants requests for findings of fact.

DEFENDANTS FINDINGS OF LAW.

"1. The defendants had and have the right to change the channel of the creek on their own land and to fill up and change the use of the old channel, being bound only to provide a channel of sufficient capacity to take and vent the ordinary flow of water coming down the stream."

We so find.

"2. The dam and bridge constructed by the defendants are lawful structures, and having caused the plaintiff no actual, substantial injury, cannot be removed in whole or in part by injunction."

We so find.

"3. The injury shown by the plaintiff being merely technical, theoretical and inconsequential, equity will not afford any relief."

We so find.

"4. The bill should be dismissed at the cost of the plaintiff."

We so find.

Plaintiff requests the Court to make the following findings of fact:

"1. The plaintiff is, and at the time of the occurrence of the matters complained of in the bill, was the owner of land in the borough of Forty Fort, Luzerne county, through which a stream of water known as Abram's creek flows in its natural channel for a distance of about twelve hundred feet."

We so find.

"2. The defendants are husband and wife, and are lower riparian owners on said stream."

We so find.

"3. Abram's creek, by reason of the character of the higher lands which it drains and by reason of coal mining operations carried on in the neighborhood, carries down from time to time in the current thereof considerable quantities of sediment."

We decline to find this fact, as stated.

"4. The natural fall of the stream as it flows across plaintiff's land is gentle, approximating one-tenth of a foot to the hundred feet; so that in time of low water there has been and is a tendency in the stream to raise the level of the bed by deposit of sediment thereon and in time of high water to clear itself by scouring out the sediment so deposited."

We so find.

"5. In the spring of 1912, the defendants upon their own land at a point about one hundred and fifty feet below plaintiff's land built a bridge across Abram's creek."

This point is affirmed, with the qualification that we believe the evidence discloses that the bridge was a greater distance away from plaintiff's land.

"6. This bridge rests on wooden abutments or cribbed walls and these encroach on the bed of the stream, narrowing it from a width of upwards of twenty feet immediately above and below the bridge to a width of ten and one-half feet under the bridge itself. The cribbed walls have been constructed practically at right angles to the course of the stream, and cause two abrupt diversions of the water; the westerly cribbing diverts the water from the former bed of the stream almost at right angles to the eastward, and the easterly cribbing diverts it again almost at right angles to the southward. The opening under the bridge which affords passage for the water has a superficial area of one hundred and five square feet, as compared with an area of two hundred and twenty-six square feet provided for the same stream under a street bridge constructed one hundred and fifty feet farther up the stream."

This point is affirmed, with the same qualification as to the distance from the private to the public bridge.

"7. At the time the bridge was built, and at times since, the defendant, Nicholas Sardoni, told the plaintiff that the bridge was intended to be only a temporary structure, and that it was defendant's intention to put in a permanent bridge so located as to accommodate the stream."

This point is denied.

"8. The partial obstructing of the channel of the stream and the diverting of the waters, as found in the sixth finding of fact, checks and obstructs the flow of the current of the stream, and increases the quantity of sediment deposited in the bed of the stream in time of ordinary flow."

This point is denied.

"9. In December, 1912, at a point about five hundred feet down the stream from the line of plaintiff's land, defendants on their own land, constructed a dam across Abram's creek, which obstructs and dams back the waters thereof. This dam they have repaired and partially reconstructed from time to time, as the

action of the water has affected its height. Prior to June, 1915, it had been constructed to a height one foot above the level of the bottom of the creek at the point where the stream enters the lands of the plaintiff."

This point is affirmed.

"10. When maintained at its full height this dam raises the level of the water immediately above the dam three and one-half feet above the level thereof immediately below the dam, and backs the water of the stream up and upon the lands of plaintiff; and in the absence of current would maintain stagnant water in the bed of the stream throughout the whole length of its course through and over plaintiff's land to the depth of a foot at the upper boundary thereof."

This point is denied.

"11. Plaintiff's first knowledge of the existence of this dam was acquired about January 1, 1915, and January 12, 1915, plaintiff filed this bill of complaint."

This point is affirmed.

"12. In June, of 1915, at time of trial, the crown of this dam for a distance of about ten feet on the easterly side thereof had been washed out or had slipped away to a depth of about one and one-half feet, whereby the level of the water as maintained by the dam had fallen about eighteen inches at the time the measurements were taken by the surveyors who testified for the parties at trial."

This point is affirmed.

"13. It has been the practice of the defendants to restore the dam to its original height in the late fall of the year after such partial washing out."

This point is affirmed.

"14. Defendant, Nicholas Sardoni, conducts an extensive ice cream business; and defendants have constructed and maintained this dam for the purpose of harvesting ice for use in said business, and not simply for domestic purposes."

This point is affirmed.

"15. The obstructions to the waters of Abrams creek, built and maintained by defendants upon their own land, have caused and do cause the waters of the creek to back up and upon the lands of plaintiff; have caused and do cause the depth of the water to be increased and the level of the water to be raised upon plaintiff's land; have caused and do cause the flow of the current across plaintiff's land to be checked and retarded and the force thereof to be decreased; have caused and do cause the quantity of sediment deposited by the current upon the bed of the stream to be raised; and have thereby increased the liability of plaintiff's land to overflow and inundation in time of ordinary storm."

This point is denied.

PLAINTIFF'S FINDINGS OF LAW.

"1. The action of the defendants in locating, constructing and maintaining the piers of the bridge built by them across Abram's creek so as to interfere with, check or obstruct the flow of the waters of said creek, raise the bed thereof and cause the waters thereof to back up and upon the plaintiff's land, is continuously illegal and prejudicial to the rights of plaintiff as an upper riparian owner."

We decline to so find.

"2. The action of the defendants in constructing and maintaining the dam built by them across Abram's creek so as to interfere with, check and obstruct the flow of the waters of said creek, raise the bed thereof and cause the waters thereof to back up and upon plaintiff's land, is illegal and prejudicial to the rights of plaintiff as an upper riparian owner."

We decline to so find.

"3. The action of defendants in allowing the bed of the stream of Abram's Creek to become and remain obstructed and raised by the deposit of sediment and other matter brought down by the force of the current is illegal and prejudicial to the rights of plaintiff, as an upper riparian owner."

We decline to so find.

"4. The fall of the stream in its natural state, as it passes over plaintiff's land is a property right of plaintiff, incident to the ownership of his land; which has been and is illegally infringed upon and impaired by defendants."

We decline to so find.

"5. Plaintiff is entitled to the relief prayed for in his bill."

We decline to so find.

After a careful consideration of this whole case, we concur in the position taken by the defendants' counsel, that the matters complained of are inconsequential in their effect upon the rights of the plaintiff; and the injury, if any, to the plaintiff, from the causes mentioned, remain in the realm of conjecture and speculation, and, as we said before, it is our opinion that the injuries complained of come within the maxim "*de minimis non curat lex*".

DECREE NISI.

Ordered, adjudged and decreed that the bill in equity be, and the same is hereby dismissed, and that the costs of these proceedings be paid by the plaintiff.

J. E. Jenkins, for plaintiff.

G. J. Clark, for defendants.

IN RE AUDITORS SCHOOL DISTRICT, PITTSSTON TWP.

Common schools—Taxes—Audit—Exonerations—Collector's accounts—Constitution, Art. IX—Acts 1834, 1836, 1885, 1911.

1. School board is culpable in failing to require tax collector to submit accounts monthly, but failure to do so will not itself justify surcharge to collector of exonerations regularly made.
2. Though good practice to insist on personal presence of the taxable before exoneration of the collector, yet this is not required.
3. Business capacity of school board would suggest spreading exonerations on minutes, yet collector is not to be held responsible for their neglect herein.
4. Though exonerated taxes may be paid later, yet when paid long after completion of audit they do not come within view of the Court as to that audit. If after exoneration collector enforces payment, he may be subject to criminal prosecution, but if he receives taxes, such taxes voluntarily offered, the school board may recover from him.
5. Constitution of 1873 declared the power of General Assembly to exempt certain kinds of property from taxation. Up to that time school boards had the right to exempt taxpayer in certain cases.
6. Art. IX, Constitution, did not execute itself without legislation, but was a limitation of the power of Legislature to pass laws exempting from taxation any property not included in its specification.
7. Act 1885, P. L. 187, and Act 1911, School Code, expressly reserve to school boards the right to make exonerations as formerly, though repealing clause of 1911 applies to school Acts 1834, 1835, 1836, 1854, right of exoneration is re-affirmed by repealing Act. Distinction noted between power of levying tax and of exonerating from a tax levied.
8. But duty of school board is to enforce collection of all taxes on real estate where personal exemption has not been allowed, and the list and reasons fully spread forth. For refusal, directors might be surcharged or supplanted.

Appeal from report of auditors. Common Pleas, Luzerne county. No. 371, June term, 1913.

GARMAN, J., March , 1918.—This appeal is based upon the question of exonerations. The amount of the duplicate was \$23,328; the exonerations were in amount \$3,680.

The record on which the exonerations were made appears as set forth in the minute book to be as follows:

Meeting of school board, May 27, 1913:

"The tax collector submitted his accounts for the fiscal year, and on motion of Keefe seconded by Mulherrin, same were referred to a special auditing committee to investigate, with direction to report on same, at the regular meeting, June 3, 1913. The chair appointed John McAndrew, John Keefe and Thomas Mulherrin as the committee."

Meeting of June 3, 1913:

"The special auditing committee reported that they had not finished the audit, but would be ready for the next meeting."

Meeting of June 28, 1913:

"The auditing committee reported that they had gone over the accounts of the tax collector and they recommend the following: The committee examines the collector's list of persons to be exonerated and they recommend that he be granted exonerations to the amount of \$3,734.91, a list of which persons and the reasons therefor was read to the board. Motion by McAndrew, seconded by Keefe, that the list of exonerations, as read by the committee, be granted. The chair directed the secretary to make the exonerations a part of the minutes of the meeting."

Objections to the audit are:

1. The collector failed to account monthly as required by law.
2. The taxable to be exonerated did not personally appear and claim the exoneration.
3. The reasons for the exonerations were not spread upon the minutes.
4. The list of taxables for exoneration was presented by the tax collector.
5. The names of the taxables exonerated do not appear in the minutes proper, but are posted in the latter part of the minute book, the pages upon which they appear not being designated in the minutes.
6. At least four of the taxables exonerated paid the tax from which they were exonerated and produced receipts for the payment of the same.
7. Owners of real estate were exonerated.
8. The exonerations are nullity, being in violation of Article IX, Sections 1 and 2, of the Constitution of Pennsylvania.

Let us consider these objections in their order:

1. The collector failed to account monthly as required by law. This charge is clearly proved; and there is no doubt that the school board is culpable in that it failed to require the collector to comply with the law in that respect and the collector made himself liable to fine and imprisonment. Nevertheless the failure to make monthly settlements could not of itself justify a surcharge to the collector of exonerations regularly made, if they were lawfully made. Even if a collector be prosecuted, convicted, fined and imprisoned under the Act of Assembly for failing to

make monthly reports and settlements, a school board could credit his account with just exonerations.

2. The taxables to be exonerated did not personally appear and claim the exonerations.

We do not think that this is required but it would be undoubtedly good practice to insist on the personal presence of the taxpayer before exoneration of the collector, except where physical disabilities prevent appearance.

In Commonwealth *v.* Titman, 148 Pa. 168, the practice adopted by the Pittston township board was followed and nothing is said by either the lower or the higher court of the illegality of such practice. The report of the case says: "In May, 1889, a committee of the board met and with defendant reviewed the exoneration list prepared by him." We are unable to sustain this and the fourth objections, although we deprecate the practice followed.

3. The reasons for the exonerations were not spread upon the minutes.

This is another reflection upon the business capacity of the board, who should have seen that the exonerations were properly spread upon the minutes; but we cannot see how the collector is to be held responsible for their neglect.

In Borough of Millerstown *v.* McKee *et al.*, 3 Pennypacker 129, the tax collector was permitted to prove by parol that the town council had exonerated him from the collection of certain taxes, although the minutes were entirely silent as to such action. The Supreme Court in a *per curiam* opinion said: "If the council did not record their action in the minutes that ought not to prejudice the defendant. This disposes of the case." And so perforce we say here of the third and fifth objections.

6. At least four of the taxables exonerated paid the tax from which they were exonerated and produced receipts for the payment of the same.

An examination of the testimony shows that payments were made as follows: July 5, 1913, Peter Dominick, \$27.72; March 3, 1914, Mrs. Michael Coxe Estate, \$11.12; June 6, 1914, Sam Boni, \$12.93; April 27, 1915, Dershimer & Griffin, \$112.76. Of these the only one unexplained by the collector is the tax of Peter Dominick, \$27.72, received before the audit and which should have been accounted for.

The taxes from the Mrs. Michael Cox Estate, Sam Boni and Dershimer & Griffin were all paid long after the completion of the audit appealed from, and in our opinion do not properly come within our power over this audit. At the time the audit was made these items stood as exonerations and were so treated by the auditors. If after exoneration the collector enforced collection of the taxes, he made himself liable to criminal prosecution under the provisions of the Act of 1841, P. L. 402, but if he received the taxes voluntarily tendered by the exonerated person, the amounts so collected may be recovered from him by the school board, and if not paid in it is their official duty to take steps to recover those amounts. The sum of \$27.72 paid by Peter Dominick, July 5, 1913, must be surcharged against the collector.

7. Owners of real estate were exonerated.
8. The exonerations were a nullity.

Appellants contend that under the provision of Article IX, Sections 1 and 2, of the Constitution of this State, the exoneration of the real estate is unlawful. These sections are as follows:

“Section 1. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used for private or corporate profit, and institutions of purely public charity.

“Section 2. All laws exempting property from taxation, other than the property above enumerated, shall be void.”

It has been held that these sections of the Constitution “did not execute themselves so as to repeal existing laws providing for the assessment and collection of taxes, but that they merely imposed restrictions on future legislation.” Walker’s Appeal, 44 Superior, 145; Gas Co. v. Chester Co., 97 Pa. 481.

“We are of the opinion that Section 1, of Article IX, is not immediately operative, but was intended by the convention to be mandatory upon the Legislature to enact laws framed upon its special intent, and to repeal all laws inconsistent therewith, leaving the Legislature in the exercise of a sound and wise discretion, to time the repeal after proper general laws shall have been passed. * * * A part of section one is the declaration, by way of exception to its generality, of the power of the Assembly

to exempt certain classes of property from taxation. * * * The subject of the second section, being directly connected with the subject of the first, indeed might have been incorporated with it, and this subject being that of repeal, it is conclusive evidence to our minds that the convention did not intend to repeal special tax laws, but to let them stand until the Legislature had enacted a proper general system of taxation to take their places." *Lehigh Iron Co. v. Twp.*, 81 Pa. 482.

With reference to Section 7, of Article IX, the Supreme Court has said, and the remark is equally applicable to the sections under consideration: "This section deals only with legislative power. It declares what is shall not do. It annulled nothing that the Legislature had done. It forbid such legislation thereafter. It struck down no law. Its prohibitions were wholly prospective." *Indiana Co. v. Ag. Society*, 85 Pa. 387.

The general principle that the Constitution does not execute itself has been many times affirmed. We cite only *Perkins v. Stack*, 86 Pa. 270; *Com. v. Harding*, 87 Pa. 343.

The Article of the Constitution under consideration forbids "exemption of property from taxation, but is silent as to exonerations of tax collectors from collecting and therein is the ground of this controversy."

The appellant claims that the Constitution forbids the exemption of property other than of the classes named from taxation; that the exoneration of the collector from the collection of taxes on the real estate of the persons named is in effect an exception unauthorized by the Constitution; that there is no law permitting the exoneration; and that such exoneration was void for want of an authority.

The appellees claim that there is a clear distinction between the exemption of property from taxation and the exoneration of the collector from collecting; that exonerations are within the power of the school board; and that the credit to the collector by the exoneration is not an exemption of the taxpayer.

The legislation of the Commonwealth, relating to exonerations of collectors of school taxes, is set forth in the Act of June 13, 1836, P. L. 525, Scranton 6, thus: "The board of directors of each district shall have the right at all times to make such abatement or exonerations for mistakes, indigent persons, unseated lands, etc., as to them shall appear just and reasonable, and the secre-

tary of the board shall enter in a book or books, to be kept by him for that purpose, the names of all persons so abated or exonerated, together with the reasons for such exonerations."

The Act of 1854, P. L. 617, Section 31, provides that "the board shall have the right at all times to make such abatements or exonerations for mistakes, indigent persons or unseated lands, as to them shall appear just and reasonable; and the secretary shall enter on the minutes the names of all persons in whose favor such abatements or exonerations were made, together with the reasons therefor."

The Act of 1885, P. L. 187, providing for the election of an official tax collector referring to exonerations, is as follows:

"Section 10. Exonerations may be made by the authorities and in the same manner as heretofore."

The Act of 1911, P. L. 309, Section 559, provides for the settlement of the tax collector's duplicate on the first day of June, "less such sum as he may be exonerated from by the board of school directors."

It will be seen that between the Act of 1836 and the Act of 1854 there is a slight difference of language, the former intimating that exonerations are made for the persons named, the latter not being quite so restrictive.

The Act of 1911 relates expressly to the collector.

In accordance with appellant's contention are the cases of *Company v. Shaffer*, 14 D. R. 368, and *Moore v. Williams*, 1 Kulp, 256.

In *Company v. Shaffer* it is expressly declared that "there are no Acts of the Legislature authorizing the council of a borough to grant exonerations from taxation. All the Acts of Assembly allowing exonerations from taxation have been abrogated by the Constitution, and no exemption from taxation can be allowed except those enumerated in Article IX, Section 1."

The plaintiff was exonerated by the borough council from the payment of school taxes. After, however, discussing the effect of Article IX, of the Constitution, the Court restrains the collection by certain persons and adds that "the Acts of Assembly authorizing exonerations were intended for the benefit and in relief of the collector who is charged with the entire amount of the duplicates, and, by reason of 'mistakes, indigent persons and unseated lands' would be unable to collect the taxes." This

decision holds the taxpayer liable, recognizes the right of exoneration of the collector, but restrains improperly appointed collectors.

Moore v. Williams was a case where a soldier claimed exemption from the collection of a special tax, under the Act of 1864, P. L. 85, and 1866, P. L. 986. Judge Rice held that "the general statutes exempting the property of honorably discharged soldiers and others therein named from taxation for certain purposes were not kept in force after the adoption of the new Constitution by virtue of the reserved power of the Legislature to classify the subjects of taxation. Both these cases are in direct opposition to the ruling of the Supreme Court in *Gas Company v. Chester*, 97 Pa., 481, and other cases deciding that these provisions of the Constitution do not execute themselves.

But it is argued by appellant that because the School Act of 1911 expressly repeals the Acts of 1834, 1835 and 1836, and the later Acts, including the Act of 1854, establishes a system of Common Schools and containing the authority to make exonerations it therefore follows that Article IX of the Constitution governs and prohibits the passage of the Act of 1885 and 1911 in so far as exonerations are concerned. There is considerable merit in this contention and we confess that it seems most logical; but the Act of 1885 is not repealed (see *Black v. School District*, 239 Pa. 96) and the Supreme Court in *Jones v. Sharon Borough*, 238 Pa. 35, has decided that a tax collector may be "discharged by credits * * * for taxes with which he had been charged in the duplicates, and which, for reasons regarded as all sufficient by the * * * authorities, they exonerated to his relief."

In *Jones v. Sharon Borough* the exonerations were made by the borough council. Mr. Justice Brown says: "No legislation has been cited specifically defining the power of borough authorities to grant exonerations from taxes in relief of a collector or fixing the time within which they must be granted, but the power to so exonerate is distinctly recognized in the Act of June 25, 1885, P. L. 187, regulating the collection of taxes in the boroughs of the Commonwealth, the tenth section of which provides that "exonerations may be made by the authorities and in the same manner as heretofore." From time immemorial—as is known to all of us—the power to exonerate collectors from liability from uncollected taxes for reasons satisfactory to the taxing authorities

has been exercised by borough councils, and, in the absence of any statutory prohibition of the exercise of this power, impliedly recognized by the Act of 1885, we shall not say it does not exist."

While in the case before us there is this difference, that there was statutory authority for exonerations by school directors, and while the Acts conferring this statutory authority have been partially repealed, still we are of the opinion that as the Act of 1885 and the Act of 1911 expressly reserve to school boards the right to make exonerations, as they were formerly made, the intention of the Legislature seems to have been to preserve the power of exoneration. If express legislation is needed to enforce the provisions of Article IX, of the Constitution, and if the statutes existing prior to the adoption of that Article continued in force until the Article should by legislation be made effective, and if we are correct in believing that the repeal did not extend to the provision permitting exonerations, then it follows that the school board in the present case might exonerate the collector and discharge him from the collection of the taxes in question.

A school board must make annual settlement with the tax collector. Up to 1911 it might credit him with exonerations for mistakes, taxes of indigent persons and taxes on unseated lands. The repealing language of the Act of 1911 is as follows:

"This Act of Assembly is intended as an entire and complete school code for the public school system in this Commonwealth, hereby established in every school district therein, and the following Acts or part of Acts, to-wit: * * * Together with any and all other Acts of Assembly, general, special, or local, or parts thereof, that are in any way in conflict or inconsistent with this Act, or any part thereof, shall, at the time of the taking effect of this Act, be, and the same are hereby repealed."

Although this repealing clause expressly applies to the school Acts of 1834, 1835, 1836, 1854, and their supplements, the right of exoneration is reaffirmed by the repealing Act.

To sum up the situation:

1st. Up to 1873 a school board clearly had the right to exonerate the taxpayer from payment of taxes in cases of mistakes, indigence and of unseated lands; and to relieve the collector from collecting such taxes.

2nd. The Constitution of 1873 declared that the General Assembly may exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used for private or corporate profit, and institutions of purely public charity. This Article was a limitation of the

power of the Legislature to pass laws exempting from taxation any property not included in the specified classes, did not execute itself without legislation and did not affect existing legislation. The right of exoneration as provided for by legislation therefore continued during the period from 1873 to 1885.

3rd. In 1885 an Act of Assembly was passed providing for the election of tax collectors and regulation of the collection of taxes in the several boroughs and townships. This declared that exonerations might be made by the authorities as they had been theretofore made, and repealed no laws except where inconsistent with said Act of 1885. It is evident that the right of exoneration continued in the period between 1885 and the time of the passage of the next Act in 1911.

4th. In 1911 an Act was passed called the School Code which, as hereinbefore stated, repealed the laws enacted before the adoption of the Constitution of 1873, but continued the power to exonerate as it existed prior to the passage of said Act of 1911. As there was no repeal of the early Acts until the Act of 1911 became operative and as the right to exonerate was preserved as specified in those earlier Acts, the intention was manifestly to repeal the earlier Acts partially but to leave unimpaired the right and method of exoneration.

But appellant argues that when the repeal of the former Acts took effect, the provision of the Act of 1911 relating to exonerations become unconstitutional. Appellees answer this objection by averring that in the present case there are no exonerations whereby real estate was exempted from taxation but only a credit to the tax collector and a discharge of collection by him and that the taxes still stand against the owners.

However, we are impressed with the belief that the case of *Jones v. Sharon Borough*, *supra*, establishes that, "without prohibitory legislation" the school board may in settlement with the tax collector, relieve him from the collection of certain taxes and credit him with the amount.

But we are equally impressed with the belief that it is the duty of the school board to enforce collection of all taxes against real estate in all cases where personal exemption has not been allowed, and to have the list and reasons fully spread upon the minutes. For their refusal to enforce such payment of taxes, the directors might be surcharged with the taxes uncollected or be removed and others appointed who would conduct the affairs of the school district in a business way.

We are unable to sustain the eighth objection to the audit, to wit, that the exoneration was in violation of the Constitution.

The appellees request the following conclusions of law:

"1. That under the provisions of Article 5, Section 559, of the Act May 18, 1911, P. L. 309, boards of school directors of

the third class in this Commonwealth have the power to grant exonerations in relief of the collector of taxes in the annual settlement of his accounts." We so find.

"2. The Act of May 18, 1911, Article 5, Section 559, is not in contravention of Sections 1 and 2 of Article IX of the Constitution of the State of Pennsylvania, because the said Act does not directly or by implication authorize the release of either persons or property duly assessed for tax liability." We so find.

"3. The taxable is not exempted because provisions have been made under the School Code Act of 1911, and prior Legislation still in force for the collection of delinquent taxes, either by the entry of a tax lien under the Act of June 4, 1901, P. L. 635, or by a civil action in assumpsit for unpaid taxes under the Act of May 18, 1911, P. L. 332." We so find.

"4. The school board having the power aforesaid to grant exonerations in relief of the tax collector, the presumption is that in the absence of proof to the contrary they performed their duties in conformity to law and acted within the scope of their powers." We so find.

"5. The appeal must be dismissed." We cannot so find. The appeal is sustained as to the sum of \$27.72 collected July 5, 1913, by the collector, Edward J. Keating, from Peter Dominick and which should have been accounted for to the auditors whose audit was made between July 7, 1913, and December 16, 1913.

We therefore find as matter of fact:

That on July 7, 1913, Edward J. Keating, tax collector, collected from Peter Dominick the sum of \$27.72 for the Pittston township school district, which sum was not accounted for in the audit filed December 16, 1913.

As matter of law:

That said sum of \$27.72 must be surcharged against said Edward J. Keating and judgment be entered against him for said amount, with costs of audit.

J. L. Morris, W. A. Valentine, for appellants.
J. T. Lenahan, J. J. O'Donnell, for appellees.

MARCUS *v.* CITY DEPARTMENT STORE.

O'BOYLE, J., November , 1917.—Common Pleas, Luzerne county. No. 475, November term, 1915.

Referee—Findings—Binding force.

Where referee, having witnesses before him, and the advantage of being in the atmosphere of the case, finds certain facts, after apparently able and conscientious efforts, those facts should be as binding on the Court as the verdict of a jury, and not to be disturbed, except the referee is in error as to the law applicable to the facts.

Reynolds & Reynolds, for plaintiff.
Mose Salsburg, for defendant.

McCALL *v.* D., L. & W. R. R. Co. *et al.*

Highways—Vacating—Termini outside borough—Trespass—Viewers—Jurisdiction of Court.

1. Vacating and relaying of a highway, not a borough street but a thoroughfare having termini outside borough limits, can be effected only through the Court of Quarter Sessions. Where vacating and relaying is otherwise done, recovery for damages may be secured in action of trespass.
2. Borough ordinance authorizing vacating, etc., of such highway is *ultra vires*, and complaint of injured property owner cannot be referred to viewers.
3. *Ut supra*, despite fact that highway was both vacated and relaid.
4. In Act 1901, P. L. 531, words "new highways or passage ways", as used in seventh section, have reference to those mentioned in fourth section, thus harmonizing Act 1901 with that of 1836.

*Motion for judgment n. o. v. Common Pleas Luzerne county.
No. 571, March term, 1914.*

WOODWARD, J., January 14, 1918.—The motion that judgment be entered for the defendants notwithstanding the verdict is based on the alleged error of the Court in permitting a recovery by the plaintiff in an action of trespass in view of the fact that the work of vacating and relaying the street which caused the damage to her property was done in pursuance of a borough ordinance and her recovery should have been before viewers appointed to assess the damages. The answer is that the highway vacated was not a borough street but a thorough highway, having its termini outside the borough limits, no part of which could be vacated except by the Court of Quarter Sessions, and, therefore, the ordinance was *ultra vires* and void, so that the defendants in making the changes in the road which damaged plaintiff's property were trespassers and joint trespassers because there was concert of action between them.

"When a public road is not wholly within the borough limits, the jurisdiction to vacate the part thereof in the borough is not vested in the municipal authorities but in the Court of Quarter Sessions." *Curtis v. R. R.*, 250 Pa. 480.

The plaintiff, Mary McCall, bought her property in the borough of Duryea on September 4, 1913. It abutted on a road running from Wilkes-Barre to Scranton through the borough. The connection of her property with the road was not direct at right angles, but by means of a private way emerging from the northern end of her property and connecting with the road at a point just outside her northern line. When she bought, the defendants were engaged in changing the location of the public road, throwing it further to the east, away from her lot and elevating it so as to cross the D., L. & W. R. R. tracks south of her lot overhead instead of at grade. The work was being done in pursuance of

an ordinance passed by the borough in September, 1912, nearly a year before she acquired title, the actual work having been begun in June, 1913. The change required an abandonment of about 1,500 feet of the old road, including all of her frontage and extending beyond her property on either side. The part described in the ordinance as vacated was only 120 feet, the width of the D., L. & W. grade crossing.

Before any work was done the plaintiff and her tenants upon emerging from her premises on the highway had to the north an obstructed way to Scranton and to the south a straight road to Pittston and Wilkes-Barre. After the work was completed their old way to Scranton was blocked by a fill and they were obliged to make a detour provided by the borough but not yet laid out and their former way to the south towards Pittston and Wilkes-Barre was closed by a concrete wall supporting the overhead railroad crossing, so that to reach any point to the south they were obliged to travel about one thousand feet in the opposite direction, *i. e.*, to the north, to get upon the new road where it diverged from the old highway and then south on the new road until it came into the old road again beyond the overhead crossing. In other words, they had to travel nearly three thousand feet to reach a point to the south that was only five hundred feet distant by the old route.

The defendants relied on the borough ordinance authorizing the work and claimed that plaintiff was in the wrong forum; that viewers had been appointed to assess the damages to the properties affected, and that she should have presented her claim to them, and asked for binding instructions, which were refused.

In their argument for judgment *n. o. v.* defendants' counsel distinguish between a mere vacation of a through road which they seem to admit is beyond the power of the borough, and a vacation and relaying which they claim a borough can do. They cite no authorities for such a distinction, nor have we found any. In the latest case on the subject, *Curtis v. Railroad*, *supra*, the road seems to have been vacated and relaid, although this fact does not clearly appear in the opinion of the Supreme Court.

Motion for judgment *n. o. v.* denied.

MOTION FOR NEW TRIAL.

WOODWARD, J., February 14, 1918.—The motion for judgment *non obstante veredicto* was denied in a decision already handed down. When the motion for a new trial was brought to the attention of the Court counsel for the defendants produced the Act of June 7, 1901, P. L. 531, regulating grade crossings and claimed that this Act governed the proceedings, although the borough had not proceeded under it nor had it been mentioned previously in the case. We are now to consider how the Act of

1901 affects the motion for a new trial. This Act is entitled "An Act relating to railroad crossings of highways and for the regulation, alteration, and abolition of grade crossings except in cities of the first and second classes."

Section 4 of the Act forbids any future crossing at grade except by order of the Court.

Section 5 provides the method by which the railroad may alter an established grade crossing and Section 6 provides the method by which the municipality may vacate and alter any grade crossing, to-wit: by passing the highway over or under the grade of the railroad.

Counsel for the plaintiff argues that the Act has no application to the present proceeding because what the borough did was not to pass the highway over or under the railroad, but to vacate a long stretch of the old highway and block it up at the crossing and make an entirely new road crossing the railroad overhead at a different point and that therefore the motion for a new trial must be denied for the same reasons given in our opinion denying defendant's motion for judgment *n. o. v.*

If we were confined to the sixth section of the Act in deciding what the municipality might do there would be no doubt of the correctness of this proposition, that the municipality could only alter the crossing by passing the highway over or under the railroad, but in the seventh section we find this language: "If any additional lands or rights or easements are necessary or required for the changes of highways or the location of new highways or passageways such lands may be taken by the municipality by purchase or condemnation". What is meant here by the words "changes of highways or the location of new highways"? Does it enlarge the power of the borough beyond what was given in the sixth section, to-wit: the passing of the old highway over or under the railroad by enabling it to do what the borough did in this case, to-wit: abandon the old highway for a distance of about 1,500 feet, build a new highway crossing the railroad at a different point and blocking the old highway on one side of plaintiff's property by a fill and on the other by a concrete wall? Or do the words "new highways or passageways" in the seventh section refer to the new highways referred to in the fourth section of the Act? We think the latter is the meaning of the Act, as if it were made to read as follows: "If any additional lands or rights or easements therein are necessary or required for the changes of highways (to avoid grade crossings by passing the highway over or under the railroad as provided in the sixth section of the Act) or the location of new highways or passageways (at grade as provided in the fourth section) such lands may be taken by the municipality by purchase or condemnation". This harmonizes the Act with the Act of 1836, which gives the exclu-

sive regulation of through county roads to the Court of Quarter Sessions. As we believe this to be the correct interpretation of the Act, we refuse the motion for a new trial for the reasons given in our opinion refusing the motion for judgment *n. o. v.*

If this is not the correct interpretation, and the Act of 1901 gave the borough the right to abandon and vacate the old highway and construct a new highway crossing the railroad at a different point, then we arrive at the same conclusion. For if the borough had the right to do what it did under the Act of 1901, nevertheless it did not proceed according to the Act, to-wit: by purchase or condemnation. "Additional rights or easements" were necessary "for the changes of highways", to-wit: the rights and easements which the plaintiff had in the old road, which they destroyed by abandoning the road and blocking her off from access to her property. It is true they did not take her property, but since the Constitution of 1874 they cannot injure or destroy it without compensation. They did not proceed by purchase or condemnation as provided in the Act which would have been either by paying her or by filing a bond to secure her damages. Until the money was paid or the bond filed they were trespassers and their agent, the D., L. & W., who did the work, was a joint trespasser, so that we arrive at the same conclusion as in the opinion refusing judgment *non obstante veredicto* by the other route. Motion for a new trial denied.

B. R. Jones, J. H. Oliver, E. C. Jones, for defendants.
J. T. Lenahan, E. A. Lynch, for plaintiff.

CANTOR *et al.* v. KASARDA.

O'BOYLE, J., November , 1917.—Common Pleas, Luzerne county. No. 145, March term, 1917.

Act 1842—Property attached for debt—Justice's record.

On exception to record of justice of the peace, where proceedings were instituted under Act of 1842, attaching property for debt, *held*, that record should show what the property attached consisted of; that inventory was left with the person in whose possession property was found.

John McGahren, for defendant.

PENN'A TRUST CO. v. MEBANE.

Common Pleas, Luzerne county. No. 210, March term, 1917.

Mortgage—Sci. fa.—Attorney's Commission.

Where in mortgage attorney's fee of five per cent., as therein stipulated, is denied as due, because "excessive and exorbitant, etc.", it is preferable to include in the judgment the attorney's commission as provided, with revision thereof, if unreasonable, on distribution of proceeds of sale.

NICHOLSON *v.* RITTENHOUSE *et al.**Equity—Deed—Recording—Husband and wife.*

Where A, six days before marriage to B, conveys his real estate (farm) to his daughters, but continues to live upon it and pay taxes until his death eight years later, and after which the deed was recorded, equity will decree the wife the same interest in the real estate as if A had died intestate.

Common Pleas, Luzerne county. In Equity. No. 3, May term, 1917.

WOODWARD, J., March 12, 1918.—A brief review of the facts of this case, about which there is no real dispute, will show the question presented to the Court by the pleadings.

On August 24, 1908, the plaintiff, Emma Nicholson, married A. A. Nicholson, late of Fairmount township, Luzerne county, who was the father of Edna Rittenhouse and Carrie Nicholson, two of the defendants; the other defendant, J. J. Rittenhouse, being joined as the husband of Edna Rittenhouse, whose maiden name was Nicholson.

On August 18, 1908, six days before his marriage to the plaintiff and being then engaged to the plaintiff and contemplating marriage, A. A. Nicholson conveyed all his real estate, consisting of thirteen acres of land in Fairmount township, Luzerne county, to his daughters, Edna and Carrie.

The plaintiff had no knowledge of this deed, and the evidence indicates that it was done secretly so that she might not have any knowledge of it, for the deed was not recorded until after the death of the grantor, who continued to live on the premises, paying the taxes, which were assessed to him.

A. A. Nicholson, the husband of the plaintiff, died on January 24, 1916, and letters of administration were granted to the plaintiff in June of that year, at which time the only personal property found belonging to the decedent was \$20.10 in the First National Bank of Shickshinny. The plaintiff thereupon claimed as her \$300 widow's exemption the money in bank, and the balance, \$279.90, out of the real estate conveyed by her husband to his daughters. An appraisement was filed June 22, 1916, confirmed absolutely and decree made September 5, 1916, charging \$279.90 as a lien upon the land conveyed.

The plaintiff in her bill charges that her husband, A. A. Nicholson, conveyed his property to his daughters in fraud of her mari-

tal rights and just expectations, and prays that the deed from her husband, A. A. Nicholson, to Carrie Nicholson and Edna Nicholson, dated August 17, 1908, and not recorded until January 24, 1916, in Deed Book 511, page 97, be declared null and void, and that defendants may be ordered to deliver the deed to the Court for cancellation.

The defense is that the deed was made for a valuable consideration, to-wit: five hundred dollars, in payment for services rendered by the defendants to their father in keeping house for him after the death of his first wife, and that there was no fraud in the transaction.

We are unable to grant the specific relief prayed for in the bill, but the plaintiff is entitled under her prayer for general relief to the same interest in her husband's estate that she would have taken under the intestate laws had he died intestate, and this not because of any intended fraud perpetrated upon his wife by the decedent, but upon the ground that the deed made under the circumstances was a fraud in law.

In Duncan's Appeal, 43 Pa. 67, a married woman, two days before her marriage, executed a deed of trust without the knowledge of her intended husband, conveying her property to her half brothers in trust to pay the income to her during life and to her heirs after death, and in the case of her death, without issue, then to her half brothers, etc. After the marriage the husband filed a bill to annul the deed and a decree to that effect was made in the lower court, and afterwards affirmed in the Supreme Court. Chief Justice Lowrie, writing the opinion of the court, says: "Common candour forbids that so important a change in his intended wife's circumstances, and in her power over her estate, should be made without his consent, and equity sternly condemns it as a fraud upon his just expectations. This principle of equity has stood the test of experience too long to be open to dispute now."

The rule where the husband makes the conveyance in contemplation of marriage is somewhat different, on account of the different interests given the husband and wife by the intestate laws of Pennsylvania.

In Baird *v.* Stern, 15 Phila. 339, the facts were almost identical with the case now before us, and Justice Thayer set aside the

deed so as to enable the wife to take the interest in her husband's estate which she would have been entitled to if he had died intestate.

The same principle is upheld in *Potter v. Trust Company*, 199 Pa. 366.

Ordered, adjudged and decreed that the defendants, Edna Rittenhouse, J. J. Rittenhouse, and Carrie Nicholson, pay, or cause to be paid, to the plaintiff, Emma Nicholson, out of the lands conveyed to them by their father, A. A. Nicholson, in his lifetime, the share or interest that the said plaintiff would be entitled to under the intestate laws of Pennsylvania had her husband, A. A. Nicholson, died intestate and seized of the land described in the bill which he conveyed to the defendants by deed dated August 17, 1908, acknowledged August 18, 1908, and recorded in Luzerne county, Deed Book No. 511, page 97, on January 24, 1916.

D. E. Coughlin, for plaintiff.

W. I. Hibbs L. E. Wedeman, for defendants.

BERLINER *et al.* v. CORNEY.

Practice—Act 1915—Affidavit of defense—Service on plaintiff.

By rule of Court, Sec. 1, Practice Act, applies to all cases begun in Common Pleas or brought therein on appeal from justice of the peace, and plaintiff is entitled to judgment where, following appeal, plaintiff's statement was duly filed and served, and defendant's affidavit of defense was not served on plaintiff or his attorney.

Common Pleas, Luzerne county. No. 879, December term, 1917.

WOODWARD, J., March 20, 1918.—Plaintiffs ask for judgment against the defendant for failure to serve on the plaintiffs or their attorney a copy of his affidavit of defense which was filed February 26, 1918, as required by the twelfth section of the Act of May 14, 1915, P. L. 483, known as the Practice Act. The case was brought into the Court of Common Pleas by an appeal from the judgment of Alderman J. Frank Reinig, the transcript of appeal being filed in the prothonotary's office December 3, 1917. On February 11, 1918, plaintiffs filed their statement, which was served upon the defendant or his attorney, who filed his affidavit of defense in the prothonotary's office on February

26, 1918, but failed to serve a copy upon the plaintiffs or their attorney.

The Practice Act provides in Section 1 "that from and after January first, one thousand nine hundred and sixteen, in actions of assumpsit and trespass, except actions for libel and slander, brought in any Court of Common Pleas, the procedure shall be as herein provided," and in the twelfth section it is provided that judgment may be entered for failure to serve the copy of the affidavit of defense, but we are in some doubt whether the first section of the Act quoted above applies to the cases brought into the Common Pleas on appeal from a justice of the peace. This Court, however, has adopted a memorandum, which was filed in the prothonotary's office as a Rule of Court, allowing judgment to be entered in favor of the plaintiff on the failure of the defendant to serve the affidavit of defense on the plaintiff or his counsel. The title of the memorandum is "Procedure under 'Practice Act 1915,' P. L. 483," and the first section reads as follows: "In every action which has been begun in this court, but in which no statement has been filed before January 1, 1916, and in every case brought into this court by appeal from a justice of the peace, in which no special statement has been filed before said date, the said Act shall apply to all of the pleadings."

In this case no statement was filed before January 1, 1916, but a special statement was filed after that date, and the plaintiff is entitled to judgment under the rule.

David Rosenthal, for plaintiffs.
H. H. Weintraub, for defendant.

WILKES-BARRE & HAZLETON ICE CO. v. JONES

WOODWARD, J., January 14, 1918.—Common Pleas, Luzerne county. No. 328, December term, 1917.

Certiorari—Quashing—Service in five days—Rule of Court.

The judgment in this case was entered on October 3, 1917. Certiorari not taken until October 30, 1917, more than twenty days after the entry of the judgment, which was too late, if the justice had jurisdiction of the case, which we find that he had. Court Rule No. 10, paragraph 6, provides that exceptions shall be filed at least ten days before the day fixed for argument, which was not done in this case.

Under Act March 20, 1810, 5 Smith's Laws, 161, certiorari will be quashed if it is not served within five days after its issuance. The certiorari was issued on October 30, 1917, and served on November 5, 1917, one day too late.

Certiorari quashed.
G. L. Fenner, for plaintiff.
E. A. Lynch, for defendant.

SLATTERY *v.* HENDERSHOT, COUNTY CONTROLLER.

District Attorney—Compensation for trying appeals—Acts May 3, 1850, and May 19, 1887.

Article 14, Section 5, Constitution of Pennsylvania, not to be interpreted as inhibiting a district attorney from receiving extra compensation for trying appeals before Superior or Supreme Court. His duties, prescribed by Act May 3, 1850, P. L. 654, do not include preparation or trial of appeals; such work might be delegated to another. Where district attorney does the work he is to be compensated as authorized in Act May 19, 1887, P. L. 138.

Petition for mandamus. Common Pleas Luzerne county. No. 110, July term, 1918.

WOODWARD, J., July 6, 1918.—This is an alternative mandamus to compel the county controller to audit and approve the payment to the district attorney of his bill of \$267 for services and expenses in defending an appeal to the Supreme Court taken by Angelo Corsino, from the judgment of the Court of Oyer and Terminer of Luzerne county, in a murder case in which the defendant was convicted of murder in the first degree.

The case involves an interpretation of Section 5, Article 14, of the Constitution, which reads as follows:

"The compensation of county officers shall be regulated by law, and all county officers who are or may be salaried, shall pay all fees which they may be authorized to receive, into the treasury of the county or State, as may be directed by law. In counties containing over one hundred and fifty thousand inhabitants, all county officers shall be paid by salary, and the salary of any such officer and his clerks, heretofore paid by fees, shall not exceed the aggregate amount of fees earned during his term and collected by or for him."

And Section 15 of the Act of 1876, P. L. 13.

The question was decided tentatively by this Court in 1916 by a so-called memorandum written by Judge Fuller, as follows:

"Memorandum concerning liability of county for compensation of district attorney on appeals to the Superior Court.

"It has been the custom for twenty years to pay this compensation, and no question concerning the propriety of such a course has been raised until the present time, when two objections are suggested, viz.: (1) That the Act of May 19, 1887, P. L. 138, which is the sole legislative foundation of liability, applies expressly and only to the 'Supreme Court', and not to the 'Superior Court'; (2) that by Section 5, Article XIV, of the Constitution, and by the Salary Act of March 31, 1876, P. L. 13, the compensation of the district attorney is limited to his salary, and all fees earned by the office come to the county.

"1. The answer to the first objection is, that the Act of 1887 became law before the creation of the Superior Court, which can-

not be distinguished on principle from the Supreme Court, that the legislative intention plainly contemplated any appellate court to which a case might be appealed and in which the service might be rendered, and that this equitable construction should be accorded in order to compensate important, laborious and responsible service which would otherwise be entirely unrequited.

"2. The answer to the second objection is, that the later Act, of course, governs the earlier, unless prevented by the constitutional provision; and the constitutional provision cannot be reasonably construed to prevent.

"It provides that 'in counties containing over 150,000 inhabitants, all county officers shall be paid by salary.'

"This does not say 'by salary alone', and does not of itself exclude additional compensation for particular or unusual services outside of the duties prescribed for the office.

"The exclusion of such compensation must, therefore, be sought in the language 'and all county officers who are or may be salaried shall pay all fees which they may be authorized to receive, into the treasury of the county or State, as may be directed by law.'

"The word 'fees' in this provision, was not intended and should not be construed to mean the professional compensation paid by clients to attorneys, but only the specific charges fixed by law for official acts and not derived from the county itself. By no reasonable interpretation can it be applied to unspecified *quantum meruit* compensation of the kind under discussion, which is derived from the county; for the proposition of payment by the county of compensation which must be returned to the county, involves an absurdity which we should not impute either to Constitution or legislation.

"The matter, in our opinion, not merely falls within the large category of things in which manifest injustice is often allowed to govern a strictly literal interpretation, but is really one in which our conclusion to allow the compensation does not antagonize such an interpretation."

We might amplify the reasons so succinctly set forth in this memorandum, but can add nothing of value. The district attorney's duties are confined to the county; he is not obliged to prepare and try appeals to the Supreme Court. His duties are defined by the Act of May 3, 1850, Sec. 1, P. L. 654, 1 P. D., 1227, as follows:

"The officer so elected shall sign all bills of indictment, and conduct in court all criminal or other prosecutions in the name of the Commonwealth, or when the State is a party, which arise in the county for which he is elected, and perform all duties which now by law are to be performed by deputy attorney generals; and receive the same fees or emoluments of office."

But when he does so prepare and try cases appealed he is allowed compensation for his services and expenses by the Act of May 19, 1887, P. L. 138, Section 2. The county is not obliged to employ him to prosecute the appeal, but may employ other counsel. Indeed, if the district attorney was not admitted to practice in the Supreme Court the county would be obliged to employ other counsel. That he should be obliged to repay to the county fees and expenses paid him by the county is not conceivable.

In the cases relied on by the respondent, Schuylkill County *v.* Wiest, 257 Pa. 425, and Schuylkill County *v.* Reese, 249 Pa. 281, the fees were paid to county officers by persons other than the county for services prescribed by statute or Act of Congress.

Alternative mandamus is made peremptory.

STEINBERG & Co. v. FAY.

*Sales—Goods damaged—Verdict—Expenses for replacing goods—
New trial.*

Where in suit for seasonable goods sold and delivered, jury finds that goods were received in damaged condition, were defective before shipment, verdict which includes reimbursement to defendant consignee for reasonable expenses in replacing goods will not be disturbed.

Motion for new trial. Common Pleas Luzerne county. No. 922, March term, 1914.

WOODWARD, J., May 31, 1918.—In the fall of 1912, the defendant, William M. Fay, a merchant of Pittston, Luzerne county, Pa., purchased from the plaintiff, Carl Steinberg & Co., doing business in New York City, a consignment of straw hats for the summer trade of 1913. The hats arrived in a damaged condition, having been soaked in water somewhere en route. The defendant notified the plaintiff promptly of this fact, refused to accept them, and asked for instructions as to what to do with them. The plaintiff refused to acknowledge any liability to take back the hats, whereupon the defendant went into the open market and purchased hats to take the place of the ones that were damaged.

The plaintiff brought this suit to recover the price of the hats, claiming that they were delivered in good condition to the carrier, and that any loss should therefore fall upon the defendant and not upon the plaintiff. The defendant subsequently, under an agreement with the plaintiff, sold some of the damaged hats for thirty-six dollars.

The verdict of the jury settled these facts in favor of the defendant:

1. That the hats were delivered in a damaged condition; that the damage was done before they left the custody of the

plaintiff; that defendant was not liable and was entitled to set-off against the claim of the plaintiff \$115, representing the price of the hats which the defendant bought to take the place of those damaged, plus the expense he was put to, and minus the salvage on the hats, \$36, making a net sum of \$79, for which they gave their verdict in favor of the defendant.

Plaintiff has filed nine reasons for a new trial. The only one that we had any doubt about was the fourth, to-wit:

"The Court erred in permitting the defendant to give testimony as to the alleged expense defendant claims he was put to in buying other hats to replace those bought from plaintiff."

We allowed the jury to certify a verdict in favor of the defendant for the price of the hats he was obliged to buy, and, in addition thereto, the necessary expenses to which he was put, on the theory that he was entitled to be made whole by being placed in the same position that he would have been in had the hats that he ordered from the plaintiff arrived in good condition, and that to place him in this position he was entitled to any necessary expenses that he was put to. He testified that he had to spend three days in New York visiting wholesale places in order to secure hats to take the place of those purchased from the plaintiff, and charged up his railroad fare, his hotel bills, and freight on the hats, the total charge being \$151, \$78 of which was the price of the hats, the balance for expenses.

The jury did not allow him all the expenses that he claimed, but cut his claim down to \$115, from which they deducted \$36 for salvage on the damaged hats, leaving the net verdict \$79, which we think is a fair verdict under the circumstances.

In most of the cases that we have examined the question of expense was not involved, the defendant's claim for set-off being limited to the cost of the articles purchased to take the place of the damaged goods, or goods not up to samples, or to the cost of correcting defects in work not up to specifications.

In *Johnson v. Freeman*, 160 Pa. 317, the Court below instructed the jury that they might allow the defendant as a set-off against plaintiff's claim for a piece of machinery ordered by the defendant and supplied by the plaintiff which was not up to specifications, not only the cost of remedying the defects, but the necessary expenses to which he was put which were the result of those defects, and this instruction was approved by the Supreme Court on appeal and judgment affirmed. This seems to be reasonable and we have found no decisions in which it has not been allowed where claimed.

The exceptions are therefore dismissed, and motion for new trial is denied.

C. M. Bowman, for plaintiff.
J. L. Morris, for defendant.

RUTH v. LACKAWANNA AUTOMOBILE CO.

Interpleader—Right to return goods—Paying value of goods—Acts 1848 and 1897.

1. Claimant in a sheriff's interpleader having by mistake given a bond (not excepted to) under Interpleader Act of 1848, conditioned for the return of the goods, cannot discharge his liability by returning the goods, but must pay the value thereof as required by Act 1897, P. L. 95 (which repealed Act 1848), "and condition of bond that should have been given thereunder" that claimant "shall at all times maintain his title * * * or pay the value thereof to the party entitled."
2. In addition to payment of value, counsel fee may be taxed as part of costs—Section 13, Act 1897, P. L. 95—the amount resting in discretion of Court.

Plaintiff's rule to open judgment and defendant's petition for allowance of counsel fees. Common Pleas, Luzerne county. No. 309, May term, 1916.

WOODWARD, J., January 11, 1918.—The principal question for decision in this case is whether the claimant in a sheriff's interpleader, having by mistake given a bond (not excepted to) under the Interpleader Act of 1848, conditioned for the return of the goods, can discharge his liability by returning the goods, or whether he must pay the value thereof as required by the Act of 1897, P. L. 95, and the condition of the bond that ought to have been given thereunder.

Wallace M. Ruth, the plaintiff, was the claimant of an automobile levied on by the defendant, the Lackawanna Automobile Company, and gave a bond with the American Surety Company of New York as surety, conditioned "that if the said automobile so levied on and claimed as aforesaid shall be so forthcoming upon the determination of the said issue to answer the said writ of execution, if the said issue shall be determined in favor of said Lackawanna Automobile Co., or pay the value thereof to it, the said automobile company, then this obligation to be void, otherwise to remain in full force and virtue."

The condition of the bond, as required by the Act of 1897 which repealed the Act of 1848, should have been "that he (the claimant) shall at all times maintain his title to said goods and chattels or pay the value thereof to the party thereunto entitled."

At the trial of the case the jury rendered a verdict in favor of the plaintiff, but the Court subsequently sustained defendant's motion for judgment *n. o. v.*, whereupon counsel for defendant served notice on the plaintiff's counsel that judgment would be entered for the defendant for \$275, which notice, with plaintiff's reply thereto, is as follows:

WALLACE M. RUTH, } In the Court of Common
v. } Pleas of Luzerne county.
LACKAWANNA AUTOMOBILE CO. } No. 309, May term, 1916.

To John McGahren, Esq.,
Attorney for above named plaintiff.

Take notice that on Wednesday, August 29, 1917, at 10 o'clock a. m., I shall enter judgment for the defendant on the above entitled case for the sum of two hundred seventy-five (\$275) dollars.

EUGENE A. BRENNAN,
Of Counsel for Defendant.

Now, August 29, 1917, service of the above notice is herewith accepted. We deny the right of defendant to have judgment entered as asked for. Under the condition of the bond given in this case the plaintiff is only required to return the property levied upon in the event that the issue was decided against him, and this he is willing and ready to do without costs to the defendant.

JOHN MCGAHERN,
Attorney for Plaintiff.

On August 29, 1917, judgment for defendant was entered by the prothonotary for the sum of \$275. Whereupon plaintiff obtained this rule to open.

Plaintiff about September 17, 1917, without defendant's consent or knowledge, returned the automobile to defendant's garage, but defendant refused to accept it and notified the plaintiff where it was stored, subject to plaintiff's disposal.

If the suit were on the bond, defendant could not recover a money judgment except on the refusal of the plaintiff to give up the property, but the Act of 1897, apart from any bond, provides in Section 13, as follows:

"If upon the trial of said issue the title to said goods and chattels be found not to be in the claimant, he shall pay all the costs of said proceeding, including the allowance of a fee to counsel for the plaintiff in the execution or process as shall be fixed by the Court, and the proceeds of said goods and chattels, if in court, shall be paid to the party entitled thereto as thus ascertained. If, however, said goods and chattels have been taken by the claimant, a verdict and judgment for the value thereof shall be entered against the claimant and in favor of the defendant in the issue."

The automobile was taken by the claimant so that, treating the bond as a nullity, the defendant is entitled to a judgment for the value of the property, which was established at the trial by agreement of counsel to be \$275.

On August 28, 1917, after the trial, defendant's counsel procured a rule to show cause why a proper counsel fee should not be taxed as part of the costs, as provided by Section 13, of the

Act cited above. It has been held that the amount rests in the sound discretion of the Court, and is not to be measured by the standard in other cases, but is an allowance in the nature of costs. *Jenkins v. Courtright*, 24 D. R. 978.

We think \$15 is a proper allowance under the circumstances of this case. Rule to open judgment is discharged, and it is ordered that an allowance of \$15 as fees for defendant's counsel be taxed as part of the costs.

John McGahren, for plaintiff.

R. B. Houck, E. D. Adair, E. A. Brennan, for defendant.

KEHOE *v.* SCHOOL DISTRICT, PITTSSTON.

Common schools—Judgment—Mandamus—Funds not available—Contempt—Attachment.

Where mandamus has been awarded against a school district for payment of a judgment against it, payment to be made out of "any unappropriated funds in the hands of said school district," and the answer of the school district avers that its annual estimate of income and expenses, made before judgment rendered, leaves no unappropriated funds available for the year, and praying that payment thereof may be deferred until the succeeding fiscal year, the school district is purged of contempt of Court in not paying judgment as directed, and attachment for contempt will be refused.

Attachment for contempt of Court. Common Pleas, Luzerne county. No. 1588, October term, 1914.

WOODWARD, J., November 17, 1917.—On October 26, 1917, the plaintiff filed a petition for a rule on the directors and treasurer of the defendant school district to show cause why an attachment should not issue against them for contempt in not obeying a writ of special or mandamus execution, commanding them to pay or cause to be paid a judgment in favor of the plaintiff out of any unappropriated funds or moneys in the hands of said school district, or out of the first moneys or funds that should be received by it.

On November 3, 1917, the defendant school district filed an answer to said rule, stating that there was no unappropriated moneys in the treasury of the school district from which the plaintiff's judgment could be paid or satisfied at the time of the service of the writ of mandamus execution, nor has there been any unappropriated money available for this purpose since that time, nor will there be any unappropriated moneys available for the purpose during the balance of the present fiscal year.

That the defendant school district, in accordance with the Act of May 18, 1911, Section 537, of the School Code, levied and assessed the school tax for the present fiscal year beginning the first Monday of July, basing the said levy and assessment

upon an estimate of the receipts and expenditures for the fiscal year, which is attached to the answer.

That since the assessment was made the salaries of a certain class of school teachers have been raised by Act of Assembly, and the salaries of other teachers have been raised by action of the board of directors, and that certain of the receipts have been reduced from the amount estimated, so that the estimated expenditures will exceed the estimated receipts for the current year.

That payment of the plaintiff's judgment during the present fiscal year would demoralize the financial status of the school district and leave unpaid during the year the salaries of teachers, as well as other pressing obligations of the district.

That the plaintiff is indebted to the school district in the sum of \$1,009.47, upon a judgment recovered against him by said school district on September 7, 1916, in the Court of Common Pleas of Luzerne county, from which judgment no appeal has been taken.

The defendant school district, therefore, asks the Court that the payment of the plaintiff's judgment, upon which the mandamus execution proceedings are based, may be deferred until the next fiscal year, when provision may be made in the budget or estimate to be adopted for that year, so that the financial affairs of the school district for the current year may not be disorganized, and so that the school district may proceed to the collection of the judgment obtained against the plaintiff as a set-off to the plaintiff's claims, and asks that the rule may be discharged.

The Pittston city school district is a third class district under the new School Code, which in Article 5, Section 563, provides that "the board of school directors of each school district of the second and third class shall, annually, at or before the time of levying the annual school taxes, prepare an approximate estimate of the amount of funds that will be required by the school district in its several departments for the following fiscal year. Such annual estimate shall be apportioned to the several classes of expenditures of the district as the board of directors thereof may determine. The total amount of such estimate shall not exceed the amount of funds, including the proposed annual tax levy and the State appropriation, available for school purposes in that district."

When the defendant school district made its estimate for the fiscal year beginning the first Monday of July, 1917, judgment had not been rendered in the plaintiff's case, so that it was not included in the estimated expenditures for the fiscal year.

The defendant, by its answer, has purged itself of any contempt of Court, and the rule is therefore discharged.

W. L. Pace, for plaintiff.

W. H. Gillespie, for defendants.

ECKERT *v.* WALSH *et al.*

Poor laws—Middle Coal Field Poor District—Act of May 25, 1917—Advertisement—Notice.

1. **Act of May 25, 1917,** providing for director-at-large of the Middle Coal Field Poor District, composed of parts of Carbon and Luzerne counties, is local in application, and is ineffective lacking previous notice of intention to pass, which notice is required by Constitution of Pennsylvania and Act of February 12, 1874, P. L. 43, to be advertised.
2. Presumption that the law as to notice was complied with is offset by admission of the Carbon county commissioners that required advertisement was not given. As publication in the circumstances was required in both Carbon and Luzerne counties, omission to publish in Carbon county voids the operation of the Act in both counties.
3. Injunction awarded to prevent the printing on official ballots of candidates nominated for director-at-large of said Poor District.

Common Pleas, Luzerne county. No. 1, December term, 1917.

WOODWARD, J., October 29, 1917.—On October 22, 1913, plaintiff's bill was presented to the Court, alleging:

First. That he is a qualified elector and taxpayer of the Middle Coal Field Poor District, composed of parts of Carbon and Luzerne counties, residing at Drifton, in the township of Hazle, Luzerne county.

Second. That the defendants, John Todd Walsh, Michael McLaughlin and R. Alvin Beisel, are the duly elected and qualified commissioners of Luzerne county.

Third. That George F. Buss, one of the defendants, is the sheriff of Luzerne county.

Fourth. That at a primary election held September 19, 1917, George M. Davies, another of the defendants, was nominated for director-at-large of the poor of the said district, on both the Republican and Democratic tickets; and William H. Gibson, the other defendant, was nominated for said office on the Washington party ticket.

Fifth. That these nominations were made under the provisions of an Act of Assembly approved by the Governor of Pennsylvania, May 25, 1917, providing for the nomination of a person as director-at-large for the Carbon county portion of said poor district, to serve for the term beginning April 1, 1918, and ending the first Monday of January, 1922, to be voted for at an election to be held November 6, 1917.

Sixth. That the Act of May 25, 1917, applies only to the

Middle Coal Field Poor District, which was organized under the provisions of the Act of March 26, 1862, P. L. 178, which is a purely local Act, and no notice of an intention to pass said Act was advertised in said district, as required by the Constitution of Pennsylvania and the Act of February 12, 1874, P. L. 43.

Eighth. That the county commissioners are about to print the official ballots for the November election with the names of George M. Davies and William H. Gibson upon the ballot to be voted for as candidates for said office.

Ninth. That George F. Buss, the sheriff of Luzerne county, is about to make proclamation of the said election.

Tenth. That if the commissioners are allowed to so print the ballots and the sheriff is allowed to proclaim such election, it will work irreparable injury to the plaintiff in his capacity as taxpayer in said district.

Eleventh. That the nominations are illegal and of no effect, and the printing of the names of the candidates on the ballots would entail expense upon the county of Luzerne, which is without authority of law.

And praying for preliminary injunction to restrain the commissioners, defendants, from printing the names of the candidates upon the ballot, and to restrain the sheriff from making proclamation of their election, and that the nominations of George M. Davies and William H. Gibson as director-at-large for said district be declared illegal and void, and for general relief.

An answer was filed by the county commissioners admitting all the averments of the bill except those contained in the sixth, tenth and eleventh paragraphs, which are not denied, but requiring proof of the same.

The question presented by the pleadings for decision is, whether the Act of May 25, 1917, providing for the nomination of a person as director-at-large of said district is void and of no effect for lack of notice of the intention to apply therefor as required by the eighth section of the third article of the Constitution of Pennsylvania and the Act of February 12, 1874, P. L. 43, which was passed to put the constitutional provision into effect.

An injunction bill was simultaneously filed in Carbon county by a resident taxpayer of that county, asking the Court there to restrain the commissioners from printing the name of George

M. Davies on the ballot as candidate for poor director-at-large in the Carbon county end of the Middle Coal Field Poor District, and to restrain the sheriff of Carbon county from proclaiming the election there. A preliminary injunction was granted by Laird H. Barber, president judge of Carbon county, but, on account of his inability to adjudicate the case, the hearing to continue the preliminary injunction there was held before the undersigned specially presiding, and we have handed down a decision in Carbon county continuing the injunction and restraining the commissioners from printing the name of George M. Davies on the ballot, for the reason that the Act of May 25, 1917, in question, applies only to the Middle Coal Field Poor District, and is therefore a local or special Act, requiring published notice of the intention to apply for the same as required by the eighth section of the third article of the Constitution of Pennsylvania, and the Act of February 12, 1874, and because it was conceded by the county commissioners, defendants, in Carbon county, and admitted on the record, that no notice was published of the intention to apply for said Act thirty days before its presentation to the Legislature, as required by said Act of 1874.

The Act of 1874 provides that affidavits of the publication of notice shall be presented to the Legislature before any special or local Act is passed, and the presumption is therefore strong that the proper preliminary steps were taken before the Legislature passed the Act in question. But this presumption falls when it is conceded that no such notice was given. We therefore continued the preliminary injunction already granted in Carbon county.

In the case at bar there is no admission by the defendants of a failure to give notice of the passage of the Act. An answer has been filed in which the allegation of such want of notice in the bill is not admitted and proof thereof is demanded. The only proof before the Court is the *ex parte* affidavits accompanying the bill, in which publication of notice is denied. If the Luzerne county case was before us independently we should hesitate to find as a fact that no notice was given in Luzerne county of the intention to apply for the Act, in the face of the presumption that all the requisite preliminary steps were taken before the passage of the Act, and in the absence of any admission of failure of notice, on the part of the defendants, simply on the allegation in the bill, supported by the *ex parte* affidavits. But the Act of 1874, in the first section, prescribing the manner of publication, provides that the notice shall be published by not less than four insertions in at least two daily or weekly newspapers, one of which may be in language other than English, once a week

for four consecutive weeks, printed in the county, or in each of the several counties where such matter or thing to be affected may be situated. So that to make the Act of May 25, 1917, effective, notice of the application to apply therefor had to be published both in Carbon and Luzerne counties, the Middle Coal Field Poor District to which it applied being situated partly in Luzerne and partly in Carbon counties, and failure to publish the notice in Carbon county, which was established on the hearing there, affects the Act not only in its application to Carbon, but also to Luzerne county. And we therefore hold that, in the absence of such notice in Carbon county, the Act was void and of no effect, and the preliminary injunction is therefore granted as prayed for.

J. H. Bigelow, J. C. Loose, for plaintiff.
W. S. McLean, Sr., for defendants.

Court of Quarter Sessions of Luzerne County.

IN RE APPOINTMENT MINGO, CONSTABLE.

Townships—Officers—Resignation—Withdrawal of.

Where one has presented to Court his resignation as township constable, and Court has appointed another, Court's jurisdiction cannot be impaired by withdrawal of resignation.

Quarter Sessions, Luzerne county. No. 308, November Sessions, 1917.

STRAUSS, J., February 6, 1918.—In this case Michael Moff asks to have the appointment of the present incumbent of the office of constable revoked on the ground that he, the said Moff, is the duly elected constable of the township.

The fact is that in November, 1917, Moff presented to this Court his resignation, together with the petition of one Cavilla for appointment to the vacancy. Subsequently this Court appointed Joseph Mingo, but it seems that before the appointment was made Moff had appeared in Court and obtained from one of the clerks a return of his resignation as well as Cavilla's petition and that these papers were then and there destroyed. The appointment of Mingo, however, was made without knowledge on the part of the Court of these facts.

Moff having resigned and assisted in instituting the proceedings for the appointment of a successor gave the Court jurisdiction to make the appointment and could not afterwards impair that jurisdiction by withdrawing his resignation.

Rule granted December 31, 1917, on Joseph Mingo to show cause why his appointment should not be revoked, is discharged.

Court of Common Pleas of Luzerne County.

MASON v. HUGHES *et al.**Attachment for debt—Board and lodging—Wages—Service.*

1. Act May 8, 1876—claim for board and lodging may be taken to mean the same thing as “board”, the word “lodging” being redundant. Board means meals with or without lodging.
2. Not error for a justice to set out that debt attachment arose for wages. Attachment would be good if debt arose in any other manner. Acts 1876 and April 4, 1889.
3. Service upon clerk of corporation at a colliery, not chief clerk in executive department, not good.

Certiorari and exceptions. Common Pleas, Luzerne county, No. 276, December term, 1917.

STRAUSS, J., February 13, 1918.—On July 3, 1917, a judgment was entered against the defendant in due form after hearing upon a demand for \$27 for “board and lodging furnished by the plaintiff to the defendant at the rate of \$11 per week,” etc.

On August 13, 1917, an execution was returned *nulla bona*, and on September 27 an attachment execution was issued returnable October 4, 1917, at 10 a. m., for the amount of the judgment, \$27, and costs, “for board and lodging not exceeding four weeks”.

On October 2, 1917, the defendant claimed the benefit of the exemption law of April 9, 1849, which claim the justice disallowed, and on October 4, 1917, entered judgment against the defendant and the garnishee by default in the special form that the plaintiff shall have execution * * * of the money and effects due by garnishee to the defendant and attached in its hands, and if said garnishee refused or neglected on demand by the constable to pay the same, then the same to be levied of the garnishee’s goods and chattels as in case of judgment against it for its own proper debt.

Among other exceptions, it is assigned that the alderman erred in refusing on execution defendant’s exemption because:

2. (a) The judgment was for board and lodging, while the Act of May 8, 1876, denies exemption only where the claim is for board.

2. (c) Because it does not appear that the moneys, rights and credits attached were wages or for wages only as required by the Act, as nothing else under such Act is attachable for board.

7. The G. H. Breckenridge mentioned in the return of service

at the interrogatories and rule as the chief clerk of the garnishee, is not and was not such a chief clerk as is contemplated by the Service Acts of 1901 and 1903.

There are other exceptions which we do not consider.

Exception 2. (a) The Standard Dictionary defines board: "To take one's meals with or without lodging at a given place for a fixed price." This undoubtedly is the signification of the word as it is used colloquially. Therefore, to say in the record that the claim is for board and lodging is not inconsistent with the purposes of the Act of 1876. The term lodging is redundant. "Board" is sufficient to include "lodging". Exception dismissed.

Exception 2. (c) While there is authority for the proposition that where wages are proposed to be attached for board, the record should set out the fact that the attachment is issued against a debt for wages. *Liess v. Engart*, 8 D. R. 609. We cannot accede to that view.

By the Act of May 8, 1876, the right to attach wages for a board bill is a remedy given "in addition to remedies now provided by law; and it was probably intended by the framer of the Act to modify the Act of April 15, 1845, P. L. 450, Section 5, under which wages for labor were not attachable. It having been decided that the Act of 1876 (*supra*), did not take away defendant's exemption, the Act of April 4, 1889, was passed providing that "no exemption of property from levy or sale or attachment shall be allowed on judgment obtained for board for four weeks or less." This Act, however, covered claim for exemptions not only where the money attached had become due for wages, but in all other cases of indebtedness. But before the Act of 1876 any chose in action was attachable under the general law for board as for any other debt.

It is, therefore, not an error on the part of the justice to fail to set out that the debt attached arose for wages. The attachment would be good if the debt arose in any other manner. Exception dismissed.

Seventh exception. Depositions have been taken from which it has been established that G. H. Breckenridge, upon whom this service was made, was not chief clerk in an executive department, but that he was the colliery clerk of the garnishee at the Pettebone mine on Church street, Dorranceton. The office at the colliery was not a main or executive office of the garnishee. The return of service is upon the theory that the service was made in accordance with the Service Act of July 9, 1901, as amended April 3, 1903, Section 1 (a) to-wit: "(a) By handing a true and attested copy thereof to the president, secretary, treasurer, cashier, chief clerk, or other executive officer personally." The service upon Breckenridge could have been made only under the same section, "(e) by handing a true and attested copy thereof

at any of its (the corporation's) offices, depots, or places of business, to its agent or person for the time being in charge thereof, if upon inquiry thereat the residence of one of said officials within the county is not ascertained, or if from any cause an attempt to serve at the residence given has failed." *Park v. Oil City Boiler Works*, 204 Pa. 453; *Hudelson v. L. V. R. R.*, 14 Luz. Leg. Reg. 134.

This exception is sustained.

Now, February 13, 1918, the proceedings are reversed.

S. S. Herring, for defendant.
W. B. Mitchell, for garnishee.

NIKL v. WILKES-BARRE RAILWAY CO.

Negligence—Damages—Collision trolley car with truck.

1. Where one is riding on a motor truck by permission of the driver, with feet resting on running board, and truck is stopped at street intersection at instance of traffic policeman, and is struck by trolley car, motorman having disregarded signal of policeman to stop, negligence is imputed on part of the motorman. Question of contributory negligence on part of plaintiff, question not clear as to whether ordinarily prudent person would have acted differently, is for jury, and verdict for plaintiff will stand.
2. In case *supra*, driver had warned his passenger not to place his feet inside the truck. Plaintiff had right to assume that motorman would obey signal of traffic officer. To have jumped from truck might have entailed greater peril.

*Motion for judgment n. o. v. Common Pleas, Luzerne county.
No. 628, January term, 1916.*

WOODWARD, J. May 8, 1918.—The plaintiff in this case was riding by invitation or consent of the driver on the sideboard of an automobile truck belonging to Morris & Co., with his feet resting on the running board outside the truck, having been allowed to ride by the driver on condition that he would not put his feet inside. Two of his companions were riding ahead of him in the same position on the same side of the truck. When the truck reached the end of the bridge, at the intersection of West Market street and River street, in the city of Wilkes-Barre, it stopped so close to the track of the defendant company that an oncoming car, in passing the truck, making a turn to reach the bridge, which caused the rear end of the street car to swing out, struck the plaintiff on the leg before he could get out of the way, thus causing the injury for which he seeks to recover in this case.

The truck on which he was riding had stopped in obedience to the signal of the traffic officer stationed at the intersection of River and West Market streets, but the street car coming in the opposite direction from the truck on Market street failed to obey the signal of the traffic officer and came on until it struck plain-

tiff. There was no doubt under the evidence that the motorman of the street car was negligent in failing to obey the signal of the officer and that the accident was due to his negligence, but the question of the contributory negligence of the plaintiff is not so clear.

The test is whether he did what an ordinarily prudent man would do under the circumstances. If he had taken a position as a pedestrian so close to the track that the oncoming car hit him when it swung around the curve, he would undoubtedly be guilty of contributory negligence, and the case would be ruled by *Huffman v. Philadelphia Rapid Transit Company*, 214 Pa. 87, because the car was running on a fixed track and he could easily have changed his position, and he was bound to note the swing of the rear end of the car to make the curve, but being on an automobile truck, which, under the plaintiff's evidence, was hemmed in by another automobile in front of it, the only way he could have escaped, if he had seen the car coming on, would have been by jumping off the truck or putting his legs inside, where he had been forbidden to put them. He had a right to assume at the start that the car would obey the signal of the traffic officer. He says that he saw the car in front of the Sterling Hotel, at the point where it would have stopped if it had obeyed the signal, and assuming that it would stop, he paid no further attention to it until warned by the shouts of his companions sitting on the truck ahead of him. It was then too late and he was caught before he could get out of the way. We cannot say as a matter of law that it was the duty of an ordinarily prudent man, assuming that the street car would stop in obedience to the signal, to have descended from the truck or to have changed his position. Whether he should have kept his eye on the car and not rested on the assumption that it would stop, and whether if he had done so he might have seen it in time to have escaped, is a closer question; but even then he might have assumed that the motorman would stop his car when he saw that it would come in collision with the truck and that the truck was hemmed in by the car in front of it, so that it could not move further away from the track. He found himself without fault of his unexpectedly placed in a position of danger, and he is to be dealt with in the light of his surroundings at that time, and is not necessarily negligent even though his judgment was wrongly exercised. We cannot say under the circumstances that an ordinarily prudent person would have acted differently, but still think as we thought on the trial, that this was a question for the jury, and that the case is ruled by *Sieb v. Central Pennsylvania Traction Co.*, 47 Sup. Ct. 228.

Motion for judgment *non obstante veredicto* denied.

T. D. Shea, for plaintiff.

F. A. McGuigan, for defendant.

CONNELL *v.* KENNEDY *et al.*

Election laws—Municipalities—Acts June 27, 1913, and May 13, 1915—Certificate from prothonotary—Prima facie.

1. Certificate of election to A from prothonotary, following general November election—Act June 27, 1913, P. L. 568—is *prima facie* evidence of A's title to seat in city council.
2. Where council, relying upon primary elections Act of May 13, 1915, P. L. 309, refused seat to one holding prothonotary's certificate, and had seated another, injunction will lie to protect A's title. Court will not at this stage go behind prothonotary's certificate, and title to the disputed office must be later tested, if at all, by *quo warranto* or otherwise.
3. In case, *supra*, A had asked for injunction before council organized, alleging a threat of refusal to seat him, and council, preceding organization, was apprized of attitude of Court that injunction would follow.

Injunction. Common Pleas, Luzerne county. Sitting in equity. No. 5, January term, 1918.

WOODWARD, J., February 20, 1918.—On January 24, 1918, a preliminary injunction was issued by the Court of Common Pleas of Luzerne county restraining the defendants from interfering in any way with the plaintiff in the exercise of all his rights, duties and privileges as a member of the City Council of Pittston, and from preventing him from fully and freely participating in the meetings and deliberations of said council.

Plaintiff claims to be one of four candidates elected councilmen of the city of Pittston at the general election held on November 6, 1917, following a non-partisan primary election held in said city to nominate candidates for mayor and councilmen on September 19, 1917. It is conceded that James Kennedy, one of the defendants, was elected mayor, and the other three defendants councilmen at the general election. The question in dispute is the election of the fourth councilman; plaintiff claiming that he was elected; defendants, that one W. H. Rosencrance was elected to the position.

At the hearing of the motion to continue the preliminary injunction the plaintiff offered in evidence a certificate of his election duly signed and sealed by the prothonotary of Luzerne county, testified that he had presented the certificate to the clerk of the city council of Pittston at the organization meeting held on Monday, January 7, 1918, at 10 o'clock a. m., and that the clerk and the defendants refused to recognize his certificate of election and refused to permit him to take his seat in the councilmanic body and to participate in its organization and deliberations, and

declared that they would not at any time recognize him as a councilman of said city.

Whereupon the plaintiff rested his case, having established the material allegations of his bill.

Defendants offered the Act of May 13, 1915, P. L. 309, the second section of which provides:

"Section 2. That whenever at any primary election any candidate for nomination for the office of city councilman, in any city of the third class, shall receive a number of votes greater than one-half the number of official ballots cast by electors for nominations for said office at such primary in said city in which the nominations are to be made, the name of such candidate receiving a vote greater than one-half the number of ballots, as aforesaid, shall be printed on the official ballot at the head of the group of candidates for election to such office at the succeeding election; and, unless at such succeeding election a person voted for, for election to said office, who has not been nominated therefor as provided by law, and whose name does not appear in print on the official ballot, receive more votes for said office than the number cast at said election for the election of said candidate nominated at the primary, such candidate nominated at the primary whose name is printed on the official ballot at the head of the group of candidates as herein provided for, shall be considered as elected to said office of city councilman."

Defendants also offered a certificate of the county commissioners, under the seal of the county, as follows:

"Wilkes-Barre, Pa., January 5, 1918.

"To Whom it May Concern:

"We hereby certify that the following is a true and correct statement of the returns of the official ballots and the votes cast at the primary election held September 19, 1917, for the office of city councilman of the city of Pittston, county of Luzerne, and State of Pennsylvania, as the same remains on file in this office: Total number of official ballots cast, 2,513; total vote received by John P. McGarry, 1,714; M. N. Donnelly, 1,547; W. H. Rosencrance, 1,308; Edward L. Kearney, 1,586; Joseph P. McCanna, 925; Daniel J. Connell, 1,223; Raymond D. Bowkley, 900; E. J. Lynch, 13; James J. Moran, 4.

"In testimony whereof, we, as commissioners of Luzerne county, Pennsylvania, have hereunto subscribed our names, attested by the seal of said county of Luzerne.

"M. J. McLAUGHLIN,

"JOHN TOD WALSH,

"Commissioners of Luzerne County.

"HUGH McGEEHAN,

"Chief Clerk."

(Seal of the Commissioners
of Luzerne county.)

From which it will be observed that Rosencrance was one of four candidates for councilman at the primary who received more than 50 per cent. of the total number of official ballots cast and that the plaintiff was fifth man on the list and had less than said 50 per cent. At the general election following all the names were printed on the official ballot with the names of the four who had received at the primary an excess of said 50 per cent. at the head of the ticket, as required by the Act. At this election the plaintiff received more votes than Rosencrance and was certified elected by the prothonotary, Rosencrance receiving no certificate.

The Act of June 27, 1913, Art. 4, Sec. 16, P. L. 568, provides that:

"Whenever an election shall be held for city officers on the first Tuesday following the first Monday of November in any odd numbered year for regular terms of service, it shall be the duty of the mayor to procure at the expense of the city from the prothonotary of the Court of Common Pleas of the proper county by which Court the returns thereof shall be computed, a certified copy under the seal of the Court, of the vote for all such officers as computed by the Court according to law, and lay the same before council on the date and time fixed by law for their organization; and the said certificates shall be filed among the city archives and a copy thereof entered upon the journal."

When the council met for organization the clerk had the prothonotary's certificate of plaintiff's election (whether procured by the mayor as required by the Act just cited or not does not appear) and did not have any certificate of the election of Rosencrance.

Defendants ask us to go behind the plaintiff's certificate and investigate the validity of the election in this proceeding. This would involve the constitutionality of the non-partisan primary Act of May 13, 1915, which, beyond the regulation of the printing of the ballot, is at least doubtful. We decline to do this.

"Where there has been an authorized election for a public office the certificate of election which is sanctioned by law or usage is the *prima facie* written title to the office, and can be set aside only by a contest in the forms prescribed by law." *Goldsworthy v. Boyle*, 175 Pa. 246.

"The right to assume the functions of a member of a legislative body in the first instance and to participate in the preliminary

proceedings and organization depends wholly and exclusively upon the return or certificate of election; those persons who have been declared elected and are duly returned being considered as members until their election is investigated and set aside, and those who are not so returned being excluded from exercising the functions of members even though duly elected, until their election is investigated and their right admitted.

"The clerk of city councils is a ministerial or executive officer; he has no judicial powers which authorize him to pass upon the qualifications of persons duly certified or elected to councils. His duty is to make a list of all those who present proper certificates of election, call their names and permit them to take part in the organization. The clerk has no right to refuse to put the name of any duly certified member-elect on the roll.

"When a person appears and presents a proper certificate of election, it is the duty of the council to permit him to take the oath of office, enter his name on the roll and permit him to take part in the proceedings, and then his qualifications may be determined by the body to which he has been duly certified and elected. This may be done by the appointment of and trial by a committee of the body.

"A court of equity has power to restrain an individual from using a false and fraudulent certificate of election in derogation of the right of the person who was duly elected and received a certificate of election.

"Councils alone can determine the qualification of a person duly certified as a member, but his name must be entered on the roll of members, and he must be permitted to take the oath of office and take part in the organization and business of the councils until his disqualification is proved; for the presumption is that he is duly qualified, and he cannot be excluded until those persons who allege he is not qualified can prove their allegations." *Herr v. Common Council of Phila.*, 23 C. C. R. 631.

When the plaintiff presented his certificate of election under the seal of the prothonotary of the Court of Common Pleas, the clerk and the members of council had no discretion but to enter his name upon the roll and admit him to his seat. Whether his title could then be tried by the council as suggested in *Herr v. The Council of Phila.*, *supra*, or by *quo warranto*, which is the ordinary process, he had a *prima facie* right to his seat which

they could not ignore. Nor does the certificate of the county commissioners offered by the defendants alter the case (although not before the council at its organization), because that was a certificate of the number of official ballots cast and the number of votes that each candidate received at the primary election, while the certificate of the prothonotary presented by the plaintiff was the certificate of his election at the general election following.

It was not the province of the clerk or the council to decide at that stage of the proceedings nor is it the province of the chancellor in this proceeding to decide the title to the office. The certificate of the plaintiff's election under the seal of the proper officer settled that question *prima facie* both for the clerk, the council and the chancellor and is sufficient warrant for the Court to continue the preliminary injunction already issued until final hearing.

The certificate presented by the plaintiff and signed by the prothonotary under the seal of his office is not in the form prescribed by the Act of June 27, 1913, Article 4, Section 16, P. L. 568, but the deputy prothonotary testified that the certificate presented by the plaintiff was the certificate "sanctioned by usage", being the form in use prior to the Act of 1913. It is as follows:

"COMMONWEALTH OF PENNSYLVANIA, } ss.:
COUNTY OF LUZERNE, }

"I, T. M. Powell, prothonotary of the Court of Common Pleas in and for Luzerne county, do hereby certify that according to the returns of election, duly filed in the prothonotary's office, for the general election, held on November 6, A. D. 1917, in and for Luzerne county, Daniel J. Connell was duly elected for councilman of the city of Pittston, Pa.

"Witness my hand and the seal of said Court at Wilkes-Barre, this first day of December, A. D. 1917.

"T. M. POWELL,
"Prothonotary.
"Per EDWARD W. NOLL,
"Deputy Prothonotary."

It is argued by the defendants' counsel that the Court is powerless because the council has already organized and recognized Rosencrance as the duly elected fourth member and that he has taken his seat and is therefore a *de facto* member of the council, and that a court of equity is without jurisdiction to oust him. We cannot agree to this proposition, especially under the circum-

stances of this case, because plaintiff asked for his injunction before the council organized, alleging that the defendants had threatened to refuse to seat the plaintiff and to seat Rosencrance in his place. The Court refused the preliminary injunction at that time on the ground that even if the three duly elected councilmen had made such statements prior to taking their oaths of office, it did not follow that they would carry out their threats under the responsibilities imposed upon them by their oaths; but the Court intimated if after being sworn in they did exclude the plaintiff holding a certificate of his election, the Court would then grant the injunction.

At the hearing when the plaintiff's petition for the injunction was first presented to the Court and refused, there was present Rosencrance, the contesting member, with the city solicitor of the city of Pittston, so that when the council organized the city solicitor who was present advising the duly elected councilmen in their action was apprised of the attitude of the Court and knew that an injunction would be issued as prayed for if the elected members carried out their threat, so that the status, which defendants' counsel claims cannot be disturbed by the chancellor, was one created by the defendants themselves in the face of the intimation given by the Court what its action would be if they refused to honor plaintiff's certificate of election at their organization meeting. Preliminary injunction continued until final hearing.

E. C. Jones, Paul Bedford, for plaintiff.
J. T. Lenahan, G. R. McLean, for defendants.

VANDERMARK *et al.* v. WALLACE.

WOODWARD, J., July 8, 1918.—Rule to strike off affidavit of defense. Common Pleas Luzerne county. No. 176, May term, 1918.

Practice—Trespass—Affidavit of defense.

Under Practice Act of 1915, defendant is not obliged in action of trespass to file affidavit of defense. Defendant may by affidavit deny that he committed the Act, and thus put plaintiff to his proof. General denial of plaintiff's averments, which would not avail in assumpsit, will answer the purpose in trespass. Opinion by Woodward, J., *Vandermark v. Wallace*, 176 May, 1918, and *Pierkowski v. Thomas*, 504, May, 1918.

P. J. Sherwood, for plaintiff; G. J. Clark, for defendant.

QUIGLEY *v.* MINERS MILLS BORO. *et al.*

WOODWARD, J.—Rule to strike off appeal. Common Pleas, Luzerne county. No. 956, October term, 1916.

Borough Act, 1915—Appeal—Non-resident taxpayer.

General Borough Act of 1915, P. L. 426, gives non-resident taxpayer of defendant municipality the right to intervene and to take an appeal from judgment of a justice of the peace against defendant. Opinion by Woodward, J., in *Quigley v. Borough*, 956, October, 1916. See opinion by Fuller, P. J., *Quigley v. Borough*, 429, March, 1918.

HUDOCK *v.* NAMIOTKO.

Deed—Rescission—Consideration—Husband and wife—Wife's dower interest—Fraud.

A, a few days before his death, conveyed real estate to B, and subsequently the wife of A prayed for setting aside, alleging insufficient mental capacity of A. Evidence showed A's continual addiction to drink; that he had no home, his wife having left him; he had several times expressed intention of conveying to B, in return for services; that A was not of unsound mind at time of execution of deed; that deed was explained to him and understood by him; no fraud or undue influence, etc., that B had agreed to take care of A during life and to bury him.

Held. That services, as above, B to A, constitute adequate consideration; that deed is good subject to widow's dower interest—one-third rents, issues and profits of the realty for life.

Common Pleas, Luzerne county. Sitting in Equity. No. 7, March term, 1916.

WOODWARD, J., November 17, 1917.—This is a bill to set aside a deed from John Hudock, the husband of the plaintiff, to Stanley Namiotko, the defendant, on the ground that the grantor did not have sufficient mental capacity at the time the deed was executed to make a valid conveyance of his property.

The bill sets forth:

First: That John Hudock, late of the township of Plains, Luzerne county, died on January 9, 1916, intestate, and without issue, leaving to survive him his widow the plaintiff, Mary Hudock.

Second: That letters of administration were granted to the plaintiff by the register of wills on January 22, 1916.

Third: That on January 4, 1916, the defendant, Stanley Namiotko, by fraud, induced the decedent to execute and deliver unto the defendant a deed for all his real estate situated in Plains township, Luzerne county, therein fully described, and that the plaintiff did not join in the conveyance; that the deed was recorded on January 8, 1916, in deed book No. 509, page 128.

Fourth: That at the time of the execution of the deed John Hudock was not in his right mind and did not have sufficient mental capacity to enter into contractual relations with others, and particularly with the defendant, Stanley Namiotko; that John Hudock at the time the deed was executed was in a weakened physical and mental condition, was confined to his bed, and unable to write or sign his name; that the consideration for the

deed was one dollar and a promise by the defendant to keep Hudock for the balance of his life, defendant knowing that Hudock was then in a dying condition.

Fifth. That the condition of John Hudock at the time of the execution of the deed, both mentally and physically, was such as to render him incapable of fully comprehending the nature of the transaction, and that he was misled and deceived by the false and fraudulent representations made by the defendant.

Sixth. That the value of the real estate conveyed was between \$3,600 and \$4,000.

Seventh. That the total value of the estate left by the deceased, including the property conveyed, will not aggregate the sum of five thousand dollars.

Eighth. That plaintiff, under the Act of April 1, 1909, P. L. 87, being the surviving widow of John Hudock, who died intestate and without issue, is entitled to real and personal estate to the aggregate value of five thousand dollars, in addition to the widow's exemption as allowed by the Act of 1851.

Ninth. That the defendant knew that Hudock was married and that the plaintiff was his legal wife, and secured the conveyance with intention to cheat and defraud her out of her interest in her husband's estate.

Tenth. That since the death of John Hudock the defendant has rented the property at an annual rental of two hundred dollars.

The prayers of the bill are:

1st. That the deed be cancelled.

2nd. That the defendant be enjoined from transferring the property or encumbering the same.

3rd. That the defendant account for the rents accruing from the premises.

4th. General relief.

An answer was filed by the defendant denying the material allegations of the bill and a replication was filed by the plaintiff.

The only question raised by the pleadings is a question of fact as to whether John Hudock was of sound mind when he executed the deed to the defendant on January 4, 1916; and from all the evidence in the case we find that he was.

Hudock was an only son and inherited the property in question from his father. He had no home, his wife having left him, and the inheritance from his father provided him with enough money to live on without working, so that he spent his time in idleness and drinking until his health broke down and he became a victim of nephritis, probably brought on by his drinking habits. In his forlorn condition he was given a home by the defendant, who

cared for him and transacted what little business he had for him, so that decedent, out of gratitude to the defendant, expressed the desire to convey his property to the defendant as a return for the kindness the defendant had shown him on various occasions before the deed in question was finally executed. He had expressed this desire to several people, at times saying that he wanted to will his property to the defendant, and other times that he wanted to convey it to him by deed; and in June, 1915, he had a deed prepared by a justice of the peace in Plains township, conveying the property to the defendant, but for some reason failed to execute it. When he finally became bedridden he sent for William J. Butler, a lawyer of the Luzerne county bar, in good standing, and had the deed in question prepared. On January 4, 1916, Mr. Butler and Mr. Kleeman, another member of the Luzerne county bar in good standing, went to the house of the defendant, where they found John Hudock lying on a couch in the kitchen in a weak condition physically, but with no evidence of mental derangement, and there explained the deed to him, and called in a neighbor, Henry Adolph, a friend of Hudock who spoke German, and had him read over the deed or explain it to the decedent in German. Hudock expressed his satisfaction with the deed and thereupon signed his name with some difficulty, and after signing the deed Mr. Kleeman, who is a notary public, wrote his name, and had the decedent execute it by his mark, with the following notation: "On account of illness John Hudock signed deed also by mark. Witness: G. B. Kleeman, Wm. J. Butler, Henry Adolph."

The deed was acknowledged before Mr. Kleeman and recorded. John Hudock was taken to the hospital on January 8 and died there on January 9, 1916. Besides the nominal consideration, one dollar, named in the deed, there was the following: "It is distinctly understood and agreed on the part of the party of the second part, as part of the consideration hereof, to provide a home, support, maintain and clothe the said party of the first part for and during the term of his natural life, and upon his death to bury him." This undertaking on the part of the defendant was carried out, the defendant paying the doctor's bill and the expenses of the funeral, as well as taking care of the decedent the few days that he survived after the execution of the deed, besides the care he had already given him from the time decedent's father died in June, 1915.

We find that while John Hudock was in a weakened physical condition by reason of his habits and the disease that had come upon him, there is no evidence that his mental faculties were impaired at the time of the execution of the deed, but on the other hand the testimony of the three doctors and all the witnesses who saw him is, that his mind was clear and that he was

fully aware of the nature and extent of the property he was conveying, the person to whom he was conveying it, and the reasons for the conveyance. The consideration named in the deed was good, and the agreement to care for him and bury him was carried out by the defendant. The case is very like *Doran v. McConlogue*, 150 Pa. 98. Paraphrasing the concluding sentence of the opinion of the Supreme Court in *Doran v. McConlogue*, we say that upon a review of the whole testimony we find that John Hudock was mentally competent to convey his property on January 4, 1916; that no fraud or imposition was practiced upon him in the procurement of the disputed conveyance, and that he was not influenced to execute it by any undue solicitation; that the defendant, Stanley Namiotko, had rendered much valuable service to Hudock during a long period of time, which was duly recognized by him, and which constitutes a good consideration for the deed in controversy; that he was not disqualified from receiving the deed by any relation of trust or confidence to him, and that there is no sufficient reason why a court of equity should interfere to set aside the deed in question.

* * * * *

Plaintiff's requests for findings of

LAW.

First. Owing to the physical and mental condition of John Hudock, on January 4, 1916, the date on which the alleged deed was executed, the said John Hudock was incapable of legally contracting.

Refused.

Second. The acts of the defendant, Stanley Namiotko, in connection with securing of said deed from the said John Hudock, constituted a fraud in law.

Refused.

Third. Said deed should be deemed invalid and decreed to be delivered up for cancellation.

Refused.

Fourth. The defendant should be required to account for the rents received for said premises while they have been in his possession.

Affirmed as to rents, if any collected prior to execution of the deed, and dower.

* * * * *

Defendant's requests for findings of

LAW.

1. John Hudock, being *sui juris*, had a right to convey to the defendant, subject to his wife's dower interest, all his right, title and interest, in and to the premises in dispute without the

consent of his said wife, nor was it requisite that the defendant obtain said consent.

Affirmed.

2. The most complainant would be entitled to would be to her dower interest therein as fixed by the common law, namely, one-third part of said premises allotted to her for and during the term of her natural life.

Her dower interest would be one-third of the rents, issues and profits during her life.

3. In the absence of fraud or undue influence, mere weakness of mind or memory, short of insanity or want of capacity, will not invalidate the deed, if the grantor had sufficient capacity and intelligence to understand the nature of the transaction.

Affirmed.

4. If the deceased at the time of the execution and delivery of the deed in question had an intelligent understanding of the nature of the transaction into which he was entering, then the deed is valid.

Affirmed.

5. Advice or even persuasion to make a deed in a particular way is not fraudulent. There must be something more, something that amounts to imposition or circumvention, a species of moral constraint that takes away the free agency of the grantor, before his deed can be set aside.

Affirmed.

6. Nothing but fraud or palpable mistake are grounds for rescission, for when the parties have deliberately put their engagements in writing, the law declares the writing to be, not only the best, but the only evidence of their agreement.

Refused.

7. There being no evidence of fraud or undue influence in the procurement of the deed in question, fraud or unfair practice will not be presumed from the conveyance of said premises by the said John Hudock to the defendant, in consideration of support and maintenance for grantor's life.

Affirmed.

8. The plaintiff having alleged fraud, undue influence and misrepresentation, the burden of proof is upon her to clearly establish said allegation.

Affirmed.

9. The testimony requisite to set aside the deed in question on the question of fraud must be clear, precise and indubitable and refer to what occurred at the time of the execution thereof.

Refused.

10. In order to nullify the deed in question the evidence must show that there was such imbecility or unsoundness of mind in

the grantor at the time of the execution and delivery thereof, that he did not and could not have had an intelligent understanding of the import of said transaction.

Affirmed.

11. In the absence of fraud or imposition habitual drunkenness will not relieve a person from a contract, where the testimony shows that he had sufficient intelligence to understand the nature and character of the contract.

Affirmed.

12. There being no proof of fraud or imposition, in order to nullify the deed in question upon the allegation of habitual drunkenness, there must have been such a deprivation of reason and understanding in the grantor as to render him incapable of understanding the nature of the contract in question.

Affirmed.

13. Every person is presumed to be sane until the contrary is shown, and the burden of proof is on the plaintiff to satisfy the Court by the weight of evidence or proof that John Hudock was, on January 4, 1916, of unsound mind. If the proof in the case on this question is equal in weight and reliability, then the presumption of sanity must prevail.

Affirmed.

14. There being no fraud, undue influence, misrepresentation or imposition in the procurement of the deed, or want of capacity in the grantor, we submit that the first and second paragraphs of complainant's prayer for relief and so much of the third paragraph as shall be prejudicial to defendant's interest be dismissed.

Affirmed.

15. In the absence of an inquisitional finding that the deceased was a habitual drunkard, the burden of proof is on the complainant to show that the grantor in the deed in question was incompetent to make the deed at the time of its execution and delivery.

Affirmed.

The first and second prayers of the bill are refused. The prayer for an accounting is granted as to any rents in the hands of the plaintiff accruing prior to the conveyance to the defendant, January 4, 1917, and as to the widow's dower interest in the land in question.

Now, November 12, 1917, let the prothonotary draw a decree *nisi* in accordance with the above findings of fact and law, and give notice to the parties or their counsel as required by Equity Rule 63.

Abram Salzburg, M. S. Kaufman, for plaintiff.
W. J. Butler, G. B. Kleeman, for defendant.

FLICK *v.* BERGOLD *et al.**Tenancy in common—Deed—Warranty—Mortgage.*

A, tenant in common with others, owning one-tenth undivided interest in land (from will of father devising all his estate to children "equally") executed with others a deed to the land, to B, which deed contained usual implied covenant of warranty and special covenant of warranty. At time of execution of deed A had conveyed by mortgage to C, duly recorded, his share in the land. Afterward C issued *scire facias* on mortgage against A, joining B as *terre tenant*. On judgment against B, he sued to recover from co-tenants.

Held. That co-tenants other than the one giving the mortgage are not liable on their covenants, since the *seizin* is several, not joint—several freeholders and not an entirety of interest; that A had mortgaged only his undivided one-tenth interest and lien of mortgage was on that alone; that general covenant of warranty by each was against his or her undivided interest; that covenant of special warranty was covenant for quiet enjoyment which was not imperiled until actual or threatened eviction.

Discussion of joint tenancy, tenancy by entireties, coparceny and tenancy in common.

Rule for judgment for want of a sufficient affidavit of defense.
Common Pleas, Luzerne county. No. 737, December term, 1917.

WOODWARD, J., February 13, 1918.—This is an action of assumpsit on the covenants of warranty and against incumbrances contained in a deed from the defendants to the plaintiff for a property on South Main street, Wilkes-Barre, Luzerne county, Pennsylvania. The deed was executed by the defendants and delivered to the plaintiff October 30, 1908.

The plaintiff sues on two covenants in the deed: The implied covenant against incumbrances contained in the words "grant, bargain and sell" used by the defendants in making the conveyance, and the special covenant of warranty in which the defendants covenanted "that they, the said parties of the first part, their heirs all and singular the hereditaments and premises hereinabove described and granted or mentioned and intended so to be, with the appurtenances, unto the said party of the second part, his heirs and assigns, against them, the said parties of the first part, their heirs and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof, from, through or under them, or any of them, shall and will by these presents warrant and forever defend."

At the time the deed was executed Herman Bergold, one of the defendants and a co-tenant of the other defendants of the land in question, had already conveyed in mortgage his undivided

one-tenth interest in the land to Louisa A. O. Hickey, by a mortgage dated January 24, 1906, duly recorded and remaining unpaid and unsatisfied at the time of the delivery of the deed to the plaintiff.

On January 24, 1915, Louisa Hickey issued a *scire facias* on her mortgage against Herman Bergold joining R. Jay Flick, the plaintiff, as a terre tenant for the purpose of collecting the balance due her from Herman Bergold. Louisa Hickey died and her executors, Fred H. Crippen and M. C. Gaertner, Jr., were substituted as plaintiffs in the suit.

R. J. Flick defended in the *scire facias* proceedings which came to trial before the Court of Common Pleas of Luzerne county on November 27, 1916, on the ground that in the mortgage given by Herman Bergold to Louise Hickey, Herman Bergold's name appeared as "Herman A. Bergold" and that the mortgage was so recorded and indexed in the recorder's office of Luzerne county, and that, therefore, he, Flick, had no notice of the lien of the mortgage at the time he purchased. This defense, however, did not avail him and the trial resulted in a verdict in favor of the executors of Louisa Hickey, on which verdict judgment was entered on March 13, 1917, for \$2,228.70, which judgment was affirmed by the Supreme Court on appeal on June 30, 1917, and is reported in 258 Pa. 469.

Whereupon Flick paid the judgment and brought this suit to recover from the defendants the amount so paid by him, together with the costs and expenses of the appeal to the Supreme Court.

Affidavits of defense were filed to which the plaintiff filed exceptions that raise the principal question whether tenants in common are all liable on a covenant against incumbrances which has been broken by one of the co-tenants who had mortgaged his undivided interest prior to the execution of the deed. As we find that the co-tenants, other than the one giving the mortgage, are not liable on their covenants, it is not necessary to state or discuss the other defenses raised in the affidavits of defense.

The reason that the other defendants are not liable arises from the nature of the estate of a tenant in common of land. He is seized "*per my et non per tout*;" of the whole of an undivided moiety, not of an undivided moiety of the whole. The seizin is

several, not joint. They have several freeholds and not an entirety of interests.

Estates where there are a plurality of tenants having at the same time a present right of possession and enjoyment in the land were formerly divided into four kinds: Joint tenants, tenants by entireties, coparceners, and tenants in common.

"Joint tenancy exists where two or more persons own land by a joint title created by one and the same deed or will. This estate never happens except by purchase, either grant or devise, never by descent or mere act of the law. Wherever lands were granted or devised to two or more persons without any restrictive, exclusive, or explanatory words, the result was a joint tenancy.

"This estate was formerly favored in feudal times and for feudal reasons. Now it is not favored and the courts will not construe an estate to be a joint tenancy, but will make it a tenancy in common in doubtful cases. The distinctions between them were sometimes quite refined; but they have been rendered of small importance in this State at this time by the Act of March 31, 1812, 5 Smith Laws, 395. Of course, where express words were used "to A and B, as joint tenants," there could be no question; or "to A and B," without any further words. This also was a joint tenancy without any doubt; but where in a will a testator used any words which showed an intention that the estate should be divided, as "equally to be divided," or "share and share alike," or "equally", a tenancy in common has always been inferred." Mitchell on Real Estate, 245.

In the present case the defendants obtained their estate from their father, John T. Bergold, by will, in which he devised all his estate to his children "equally".

I. Joint tenancies were distinguished by having four unities, to-wit: Unity of interest, title, time and possession, and joint tenants were seized "*per my et per tout*". Each is seized of the undivided moiety of the whole and not of the whole of an undivided moiety. It followed that where one joint tenant died the whole estate went to the survivor or survivors, and the survivor took his estate clear of all liens or incumbrances created by the deceased joint tenant.

The Act of 1812 which abolished survivorship has had the effect, under the decisions of our Courts, of turning all such estates into tenancies in common, except trust estates, estates by entireties, and where expressly created by deed or by will.

II. Estates by Entireties. Where an estate in fee is given to a man and wife they are neither properly joint tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety "*per tout et non per my*".

III. Coparcenary. Where lands of inheritance descend from an ancestor to two or more persons.

IV. Tenancy in Common. This includes all estates except trust estates and estates by entireties, held in Pennsylvania by a plurality of tenants, except where a joint tenancy is expressly created by deed or will.

"Only one of the unities is necessary, that of possession, though others may exist. They are seized '*per my et non per tout*'; of the whole of an undivided moiety, not an undivided moiety of the whole. Their seizin is several, not joint. They have several freeholds and not an entirety of interests." Mitchell on Real Estate, p. 256.

"When land is held by several persons as tenants in common, a mortgage by one of them of his undivided share, conveys no estate in the land. The mortgage has a mere incumbrance. He is not entitled to be made a party to partition proceedings commenced subsequently to his mortgage, or to be notified thereof, and notwithstanding the statutes saving mortgages from being discharged by judicial sales, such mortgage is discharged by a sale in the partition proceedings, and is entitled to be paid out of the mortgagor's share of the proceeds of such sale." Mitchell on Real Estate, p. 206, citing *Wright v. Vickers*, 81 Pa. 124.

Where in partition the land is awarded to one of the parties, other than the mortgagor, and owelty is awarded to the mortgagor, the lien of the mortgage upon the land is discharged and the mortgagee is entitled to be paid from the owelty of the mortgagor.

The mortgage was a lien only on Herman Bergold's undivided interest.

"A mortgage executed upon a tract of land by the owner of an undivided one-half of it creates no lien upon the undivided half owned by another unless he joins in such conveyance." *Jolliffe v. Maxwell et al.*, 91 N. W. R. 563.

The conveyance by each defendant was a conveyance of his or her undivided interest and the covenant was a covenant by each against incumbrances on his or her undivided interest.

Immediately on the execution of the deed there was a breach of his covenant by Herman Bergold, but no breach by the other defendants, and, therefore, it follows that a suit on the covenant cannot be maintained against any of the defendants except Herman Bergold, by whom alone his covenant was broken.

Plaintiff relies upon the case of *Williams v. O'Donnell*, 225

Pa. 321, which held that "where two persons execute a mortgage on land, and subsequently a third person acquires an undivided interest in the land, and thereafter the three execute a deed containing a general warranty, the third party is liable in damages for a breach of the warranty resulting from an eviction under the paramount title created by the mortgage."

But the distinction is this: In *Williams v. O'Donnell*, the land mortgaged was owned originally by O'Donnell and Higgins, who executed and delivered a mortgage to one Emerson in the sum of \$3,000. This mortgage was a lien upon the whole land and not upon an undivided interest. It was on record when Allen subsequently purchased an undivided interest in the land and it remained unsatisfied when the conveyance was made by O'Donnell, Higgins and Allen to Tarbox. If the mortgage had been executed and delivered by O'Donnell and Higgins after Allen had bought, the mortgage would then have been a lien only on the undivided interest of O'Donnell and Higgins, but, having been executed by them before Allen bought an undivided interest, the mortgage was a lien upon the whole estate, and Allen bought his undivided interest subject to the lien of the mortgage, so that when he became a joint owner the mortgage was already upon the whole land, although only executed and delivered by the other two joint owners. The incumbrance was "done" by O'Donnell and Higgins and "suffered" by Allen.

In the case at bar Herman Bergold could not and did not mortgage anything but his own undivided one-tenth interest and the lien of the mortgage was on that alone.

The Act of May 28, 1715, 1 Smith Laws, 94, Section 6, provides "that all deeds to be recorded in pursuance of this Act, whereby any estate of inheritance in fee simple shall hereafter be limited to the grantee and his heirs, the words 'grant, bargain and sell' shall be adjudged an express covenant to the grantee, his heirs and assigns, to-wit: that the grantor was seized of an indefeasible estate in fee simple freed from incumbrances done or suffered from the grantor," etc. Each grantor in this case was seized of an indefeasible estate in fee simple of an undivided interest in the land conveyed, and all but Herman's was "freed from incumbrances done or suffered from the grantor of each estate." *Knepper v. Kuntz*, 58 Pa. 480.

The covenant of special warranty was a covenant for quiet enjoyment. There can be no action on this covenant until eviction either actual or threatened. The plaintiff was not and could not have been evicted and hence there was no breach of this covenant by the defendants other than Herman.

Rule discharged.

Paul Bedford, F. A. McGuigan, for plaintiffs.
T. F. Farrell, M. C. Gaertner, Jr., for defendants.

ZUCKERMAN *et al* v. TEUTONIA FIRE INS. CO.

Fire insurance—Contract—Laches—Non pros.

Where plaintiffs brought suit on contract of fire insurance within a year after fire, and statement two years thereafter, though in time for earliest probable trial in condition of trial list, non pros urged in analogy to statute of limitations will be denied.

Rule to enter non pros. Common Pleas, Luserne county. No. 720, March term, 1916.

FULLER, P. J., September 23, 1918.—This action of assumpsit was brought February 29, 1916, and the original summons having been returned *tarde venit*, an alias summons was issued March 20, 1916.

No further step was taken by either party until June 5, 1918, when the plaintiffs filed their statement showing cause of action on a policy of fire insurance, for a fire which occurred on or about March 24, 1915, the policy containing a provision that no action should be sustainable thereon unless commenced within twelve months after the fire, which was done in this case.

On June 11, 1918, the defendant made this motion for *non pros* on the ground of plaintiff's delay in not filing a statement until more than three years after the fire, and more than two years after suit brought.

In support of the motion it is urged that the contractual limitation of twelve months brings the case within the principle on which, in analogy to the statute of limitations, a *non pros* has in certain cases been decreed.

We are not prepared, however, to go quite as far as that, in motions of this character.

The analogy of limitation, as we have pointed out in sundry decisions, is not an infallible test, nor a fixed rule for determining the crucial fact of abandonment on which the motion should be decided.

Abandonment might occur even within the limitation, and might not occur even beyond the limitation.

We cannot find abandonment when the plaintiffs have gone along with their action, by filing a statement in time for trial at the earliest probable opportunity in the present belated condition of the trial list.

Rule discharged.

C. M. Bowman, B. W. Davis, for plaintiffs.
John T. Lenahan, for defendant.

CLARK v. LEHIGH VALLEY COAL CO.

Compensation Act—Findings of fact—Referee—Evidence.

1. A mine employe was found dead in the workings, small quantity of vomit near by, lamp detached from cap, coat smouldering; no witnesses to death; no evidence of noxious gases. Post mortem revealed ruptured syphilitic ulcer of aorta as cause of death. Two physicians gave opinion that vomiting preceded and caused aorta rupture. Referee found that death was due to rupture, that vomiting had preceded, the same caused either by noxious gases or smell of burning clothing, or fright at same, or combination of these causes.
2. Workmen's compensation board reversed referee, on ground that no facts were found to warrant damages, and that in such case they could reverse on question of law.

Held, Referee's finding must be based on such facts as would establish a case in trial according to rule of evidence; that facts herein were not sufficient to predicate death as caused by any means in control of the employer, and that reversal of referee should be sustained.

In Re appeal from decision of the workmen's compensation board. Common Pleas, Luzerne county. No. 811, May term, 1917.

O'BOYLE, J., September 19, 1918.—The husband of the claimant was employed by the defendant, in its mines, to look after an underground pipe line, used for the purpose of conveying silt and refuse; that on February 23, 1916, about 8 a. m., decedent was found by a man named Richard Gill, about 300 feet from the spot where former was last seen employed at his work, and about sixty or eighty feet away from the pipe line. When found, he was already dead, and was on his knees in a stooping position, his head almost touching the ground. Under his face was found a small quantity of vomit.

Portions of his coat and vest were smouldering. An open flame lamp, which he carried in the performance of his duty, was found attached to his cap and was located about two feet away from where his body was found.

An inquest was held upon the body and Dr. A. T. McClintock, pathologist of Wilkes-Barre city hospital, was directed to make a post mortem examination. The result showed that death resulted from a rupture of a chronic ulcer of the aorta, super-induced by syphilis, and the condition of the ulcer, as described by Dr. McClintock, showed that "any effort would cause this man's death, and it would depend upon having the proper degree of effort."

There were no eye-witnesses whatever to the producing cause of this death, nor can we discover, from a careful examination of the evidence offered on behalf of the claimant, any facts flowing in logical and natural sequence, such as would throw light upon the cause of death.

Two physicians testified on behalf of the claimant. One of these, Dr. W. H. Corrigan, said, that in his opinion the decedent vomited before the aorta broke, and this caused the rupture of the aorta. The other, Dr. P. J. Higgins, testified to the same effect, and further added, in response to an inquiry as to what caused the rupture of the aorta, that "the extra effort, such as vomiting, would do it, and any effort of that kind."

The evidence in the case clearly and indisputably shows, that there was no noxious or poisonous gases in that neighborhood. There was no proof whatever to show when, where, or in what manner the decedent's clothing took fire. The naked lamp which was found burning, was attached to the cap, about two feet from where the body was found, and there was nothing to show "that decedent was frightened by the discovery of his clothing being on fire."

With these circumstances the referee proceeded to find "that death of decedent was due to rupture of aorta, a large blood vessel leading from the heart, and which was caused by extra effort in vomiting, due to one of three causes—either noxious gases, the smell of the burning clothes, or the fright from the discovery of his clothing being on fire, separately or combined, and which was incident to his employment."

It is impossible for us to follow the reasoning of the referee, and say, that it is based upon what might be termed the natural and logical sequence of events, when he stated, first—that the chronic syphilitic ulcer of the aorta ruptured as the result of some supposed extra physical effort attending the act of vomiting; and second—that the vomiting was occasioned either (a) by the presence of noxious gases, or (b) by the odor of the burning clothes, or (c) by fright, by the discovery that his clothing was on fire, or (d) by one or all of these causes, singly or collectively.

It will be readily seen, from a perusal of these various causes, that there is no evidence whatever, or natural inference to base a finding of fact upon, nor to conclude that death had resulted from an injury to the physical structure of the body, while the decedent was actually engaged in the furtherance of the business or affairs of the employer.

We are unable to see why it would not be more natural to conclude, under all the circumstances, that the claimant's husband came to his death through the syphilitic condition of the aorta, disassociated wholly from his work, and that when attacked by

this fatal illness he fell upon his knees in a bending position, and suddenly emitted some vomit, and that the lighted lamp, found close to his body, had fallen when he fell, and that, unable to help himself, his clothing became ignited and produced the condition of the burned portions of his body, rather than that "the ignition of his clothing, and the fright, produced the vomiting, and the excessive strain incident thereto produced death."

The laws of this, as well as other States, will not permit referees or juries to guess at the cause of an injury, and, under the circumstances of this case, the compensation board, after a careful investigation, as evidenced by its opinion, decided that there was no proof which justified the referee's findings.

And while he (the referee) designated his findings as "findings of fact," still we are unable to see how they could be properly designated as such.

The one fact that could be found properly in the case was that upon which both sides agree, viz.: that the decedent met his death by the bursting of the aorta, a large blood vessel, leading from the heart.

It certainly could not be contended for a moment, with such uncertainty of proof, that a case of this kind, in a Court of Common Pleas, could be submitted to a jury.

"To show a state of facts, from which it appears the injury may have been due to one or more causes, is not sufficient, and, under such circumstances a non suit is properly entered." *Erbe v. Phila. Rapid Transit Co.*, 256 Pa. 567.

"It is not enough to establish the defendant's responsibility to simply prove an accident and a subsequent death.

"There must be such evidence showing death as the result of injury, that in the absence of any intervening cause we will be led to the conclusion that the accident caused death." *Swanson v. Sharkey*, 2 Dep. Rep. 1382 (1386).

If this were a case involving the reversal of the referee upon the basis of credibility of witnesses, solely, we would not interfere with his findings; and we are satisfied that the compensation board would not be likely to do so either. But it would serve no good purpose to refer it back again for a hearing *de novo*, to the compensation board, because all the evidence which could possibly have been offered, was presented to the referee, and there being before us but the single question as to whether the referee could, by any stretch of the imagination, find the fact that the decedent came to his death as a result of an "injury to the physical structure of the body, while actually engaged in the furtherance of the business or affairs of his employer," must be determined by us in the negative, as it was by the compensation board.

"A referee must be guided by the rules of evidence and unless there is evidence before him of a "sound, competent and probative character, sufficient to sustain his findings, the latter have no legal foundation." *Rotto v. Hamilton*, 3 Dep. Rep. 198 (201).

"Whether there is any legal and competent evidence upon which a finding of fact can rest or be sustained, is a question of law which the Court must determine upon appeal from the board. The Court cannot consider the weight of the evidence of the credibility of the witnesses, but its power is similar to that exercised in determining whether there is any evidence that requires the submission of an issue of fact to the determination of a jury." See opinion, Davis J., (Allegheny county) in *Selena v. Abbott*, 3 Dept. Rep. 1677 (1679). See also opinion McMichael, J., (Phila. county) in *McCauley v. Imperial Woolen Co.*, 3 Dept. Rep. 3393 (3395).

"It is always a preliminary question of law for the Court whether any fact has been established by the evidence from which an inference of negligence can reasonably be drawn. If no such fact appears there is nothing to submit to the jury." *Merrigan v. Evans*, 221 Pa., page 1.

It was stated by President Judge Shafer of Allegheny county, in the case of *Yalch v. Jones & Laughlin Steel Co.*, reported in Vol. 3, Dept. Rep., page 2185, as follows:

"If an appeal from a referee to the board be based upon an alleged error of law, the board may either sustain or reverse the referee.

"If an appeal be based upon a question of fact, the board may grant a hearing *de novo*, or may sustain the referee, but it cannot reverse the referee.

"However, the finding of a fact without any evidence is an error of law, and even though the appeal which is presented to the board assigns an error of fact, nevertheless the board may treat it as an assignment of error in law, and may reverse the referee."

The opinion was written by Chairman Mackey in the case at bar and all the members of the board concurred therein; and their final conclusion was, that there was no substantial or satisfactory evidence upon which an award can rest. This is in conformity with our opinion of the law of this case.

Now, therefore, August 6, 1918, we sustain the opinion of the compensation board reversing the referee, and dismiss the appeal. The compensation board acted within its powers in holding that this appeal was based upon an error of law and that they had a right to reverse the referee outright under Section 420 of the Workmen's Compensation Act.

R. J. Devers for claimant.

P. F. O'Neill, for defendant.

Court of Quarter Sessions of Luzerne County.**IN RE REVOCATION OF LICENSE, McGARRITY.**

State Health Department—Closing of licensed drinking places—Disregard of order—Penalty.

1. Where following order of State Health Department to close all public places, including licensed drinking places, agents of department, admitted privately to hotel bar on plea of illness, find a group being served with liquor by the manager, and themselves unnecessarily participate, proprietor being away and having forbidden sale of liquor—neither hospitality of manager to special guests nor humanity plea will absolve from duty of compliance with regulation, even though the place is not notoriously open or general defiance with order indicated, and license will be suspended—on first offense.
2. Such case not to be classed with those which flout authority and disregard public safety.

Quarter Sessions, Luzerne county. No. 680, September term, 1918.

FULLER, P. J., November , 1918.—The alleged ground of revocation is that respondent “in defiance” of the closing order issued by the State commissioner of health, did on October 25, 1918, “have his hotel and bar open at 8:35 p. m., and was engaged in serving intoxicating liquors to at least twelve persons.”

The licensed place is known as the Hazleton House, which has been a reputable establishment for upwards of seventy years, and is one of Hazleton’s chief hotels, having eighty rooms and serving meals daily to several hundred guests.

When the closing order was issued on October 4, respondent obeyed promptly and implicitly. He closed and locked his bar-room, gave strict orders to keep it so, drew out all the liquors left on tap, discharged his bartenders, and has allowed no sales from that day to the present.

On Friday evening, October 25, however, certain circumstances occurred, as herein narrated, constituting the basis of this complaint.

Two representatives of the State health department seeking evidence of violation and in their zeal willing to participate, stood in front of the hotel. One of them asked a by-stander where a drink could be obtained, as he felt sick and was in sore need of bibulous succor. The man replied it would be difficult, but he would try to find a place; whereupon he escorted them through

the hotel to the inside door of the barroom, which was locked, but on knocking it was opened for their admittance.

Inside was respondent's manager of the hotel, in his shirt sleeves, behind the bar, serving beer to eight men, who were standing there recipient.

The guide explained that his two companions were his friends, one of whom was sick, and on the score of simple humanity should be served with drink. Whereupon the manager, moved with pity, furnished beer to all three without discrimination between him that was sick and the other two.

The worthy representatives of the health department, although a sufficiency of evidence had been already thus obtained, nevertheless gravely disregarding the danger of contagion, which, of course, attended their exploit, lingered long enough to clinch the case by following the beer with two drinks each of whiskey, when they departed with great satisfaction of body and mind, forgetting to suggest the dispersion of the said eight men.

It is rather notable in this narrative, that the representatives of the health department actively and passively thus participated in a gathering, which on the theory of the department was a menace to the public health.

Inasmuch as they saw the eight men standing at the bar, it was quite unnecessary that either representative should take a drink, less necessary that both representatives should take a drink, and still less necessary that both representatives should take a multiplicity of drinks.

It seems, or at least it is so testified, that the eight men at the bar were personal friends of the manager, traveling in automobiles from Philadelphia, who had dropped in to take dinner with him, and at the hour in question were being treated by him to a box of bottled beer.

After a half hour's hospitality they went away and the barroom was again closed against the world.

The respondent had no knowledge of this performance, which was contrary to his express direction.

He had gone to his home, a long way off, for the night.

In favor of innocence, we are bound to presume that if he had been on hand the performance would not have been allowed. Nevertheless, it was the act of his responsible manager, whose knowing violation of the order issued by the department of

health cannot be justified on the plea of either hospitality or humanity, or, we may add, the method employed in its detection.

The case does not stand at all upon the footing of one in which a licensee wilfully flouts authority, ignores public safety, and in defiance or in cautious camouflage goes right on with his traffic, a case which on proper proof would be surely punished by permanent revocation.

This respondent was not guilty of defiance, but only guilty of having a manager who allowed his hospitality to run away with his judgment; and, for the first and only offense of this character, suspension is sufficient punishment.

Accordingly the license is revoked *pro tanto*, by suspension until further decree on application and hearing, after the proper health authorities shall have vacated the order.

IN RE RULE TO REVOKE LICENSE OF MCKENNA.

State Health Department—Disregard of order to close saloon—Penalty—Costs.

State Health Department has authority, under certain circumstances—Act 1905, P. L. 312—to close all places of public resort, including drinking places. And where in absence of proprietor and despite his orders bartender dispenses bottled goods to a few on sincere plea of a doctor's prescription, without opening of the place in general defiance of authority of health department, revocation of license will be refused, with costs on the county.

Quarter Sessions, Luzerne county. No. 663, September term, 1918.

FULLER, P. J., November , 1918.—The averred ground for this rule is that the respondent "in defiance" of the order issued by the State commissioner of health, "did on October 21, 1918, have his hotel and bar open and was engaged in the serving and selling of intoxicating liquors to at least two persons."

It is, of course, a matter of public notoriety that the State commissioner of health on October 4, 1918, did issue an emergency order "to close all public places of entertainment, including theatres, moving picture establishments, saloons and dance halls, etc.," reciting as the reason therefor, that "the spread of epidemic influenza in other States has shown that public gatherings and places where large numbers of people are likely to congregate, play important parts in the dissemination of the disease."

His power to do so, under the Act of April 27, 1905, P. L. 312, cannot be doubted, and if it could be doubted, the doubt must necessarily be resolved in favor of the public health.

The word "saloons" is lacking in legal precision, but must be understood to mean the licensed retail drinking places.

The order does not expressly prohibit the furnishing of liquor in such places, but by expressly closing them it must be construed to prohibit that which is the distinctive function of a retail drinking place, and which alone creates the temptation for people to congregate therein.

The purpose of the order would not be infringed, perhaps, by a sporadic sale of liquor to a single thirsty individual, but the spirit would be thus infringed by opening the door and by introducing a line of demarkation too easily transgressed.

It is proper to say that the order was generally construed as we construe it, to contemplate a complete cessation of retail liquor selling; and it is only fair to add in behalf of this hard hit class of citizens, that a very large proportion of the retail liquor dealers have governed themselves by this construction in closing and keeping closed their places of business.

By the uncontradicted evidence in this case it appears that this respondent, who has held his license for nineteen years unchallenged by any complaint of misbehavior, rendered prompt and implicit obedience to the order by closing his bar and keeping it closed; but that during his absence on the day in question, and against his express command, the man who had been employed as a bartender and was an inmate of the house, sold to each of two individuals a pint of whiskey, which he took from the closed barroom and delivered in another room, after first refusing but finally consenting on the plea, which was true, that the liquor was required for sick persons on a doctor's prescription.

In this transaction we cannot find any "defiance" by the respondent of the order as charged, or that in any true sense he "had his hotel and barroom open and was engaged in the serving and selling of intoxicating liquors."

Even if he had sold the whiskey himself under similar circumstances we would hesitate to revoke the license, although we would think proper, perhaps, to punish by suspension as a warning; or if the act of the bartender, though expressly forbidden, had been clothed with any indications of authority, such as an open barroom, or a group of people, or unhesitating service, we might impute the performance to the respondent with greater punishment, but the proved circumstances acquit him of all complicity, direct or indirect, actual or technical. He had done all that could be reasonably expected of him, and it would be unjust for the Court to go further than to define, as we have defined, the principles which should govern in the premises.

We discharge the rule, but as the same was commendably obtained in good faith on apparent cause for the general welfare, we impose the costs upon the county.

IN RE REVOCATION OF LICENSE OF KLIMEK *et al.*

*Federal fuel administration—Closing to conserve fuel—Disregard of order
—Licensed drinking places.*

1. Where federal fuel administration orders public places closed to conserve fuel disregard of proprietor of public drinking place will subject licensee to penalty of suspension of license.
2. A person who with deliberate and self-serving purpose violates an edict as above commits an unpatriotic, disloyal deed, which casts a cloud upon his citizenship, even though, as herein, said edict was not clearly within the literal powers of the fuel administration as defined by Act of Congress, and though its operation was but temporary.

Quarter Sessions, Luzerne county. No. 471, November term, 1918.

FULLER, P. J., November , 1918.—The chairman of the Federal Fuel administration committee of this county, in the faithful performance of his important duties, and with an indefatigable determination to compel literal compliance with the orders of the Federal fuel administrator, by punishing the disobedient, has obtained rules to revoke these four licenses on the ground of disobedience to the famous edict which, *inter alia*, provides that "on each and every Monday, beginning Monday, January 21, 1918, and continuing up to and including March 25, 1918, * * * no fuel shall be burned for the purpose of heating rooms or buildings in which liquor is sold on those days."

Whatever views may be entertained concerning its expediency, we must all agree in a true spirit of loyalty that the edict must be strictly obeyed under penalty for disobedience.

No civilian can be permitted, any more than a soldier can be permitted, to dispute or disregard the absolute authority of the War Administration in all of its manifold policies and departments, and no right-minded person would dare to do so.

This edict as officially interpreted forbids the use of fuel for heating a house or any part of a house in which, or in any part of which, liquor is sold on any one of those Mondays.

It does not forbid the sale of liquor, but only forbids a contemporaneous use of fuel, so that the licensee must either give up selling liquor or using fuel.

He must choose between liquor and fuel.

He has a perfect right to sell liquor or a perfect right to use fuel, but he cannot exercise these rights in conjunction.

If he sells liquor, the house must be cold.

If he uses fuel, the house must be dry.

His guests must go either cold or dry, for they cannot be both warm and wet.

The ostensible purpose of the edict is the conservation of fuel, but its real, though perhaps unintended effect, is to prohibit the sale of liquor, because presumably most people would prefer the alternative of being warm.

It must be conceded that a person who with deliberate, self-serving purpose and full realization violates such an edict, commits an unpatriotic, disloyal deed which casts a cloud upon his citizenship and fitness to hold a license under the law of the State.

While we express these lofty views, however, we should consider in gauging the penalty for disobedience, that the edict in its relation to the present matter was one of startling novelty, that it was not obviously adapted to the announced aim of hastening coal aboard ships, or even to the aim of conserving fuel, that it was not clearly within the literal powers of the Federal fuel administrator as defined in Act of Congress, that it was received throughout the entire country with a storm of adverse and indignant criticism, that it had only been promulgated for a very few days at the time of these alleged violations, that it has required a large amount of interpretation, and that in all this atmosphere of uncertainty a perfect measure of realization or compliance by the average untutored person could not reasonably be expected, and the penalty for non-compliance should not be made too drastic on the first complaint.

In one of these cases we find no adequate proof of non-compliance.

In the other three, we find non-compliance, under circumstances, however, which in our opinion do not demand so severe a punishment as absolute revocation of license, or more than a brief suspension, which will punish while it sounds a warning.

1. In the case of Adam Klimek, we find by weight of express evidence that he did in fact sell liquor on Monday, January 28th, in violation of the edict; and we revoke his license *pro tanto* by suspension for ten days.

2. In the case of Richard O'Donnell, while express proof of a sale was not adduced, certain circumstances were expressly proved or admitted, or not denied, which allow no other reason-

able inference; hence we find that in fact he did sell liquor on Monday, January 28, 1918, in violation of the edict; and we revoke his license *pro tanto* by suspension for ten days.

3. In the case of Paul Locuta, the evidence of non-compliance is inadequate and we discharge the rule.

4. In the case of Anthony Turek, we find by weight of express evidence that he did in fact sell liquor on Monday, January 28, in violation of the edict; and we revoke his license *pro tanto* by suspension for ten days.

In all of these cases the liability of the county for the costs of prosecution is hereby certified, on bills to be audited in the usual manner.

IN RE REVOCATION OF LICENSE OF SCANLON.

State health department—Licensed drinking places—Orders to close—Disregard—Penalty.

Where orders of State health department—in epidemic—to close all drinking places is disregarded by licensee, neither confession of non compliance nor plea of large family to support will avail to prevent suspension of license and imposition of costs.

Quarter Sessions, Luzerne county. No. 662, September term, 1918.

FULLER, P. J., November , 1918.—The charge is that in defiance of the closing order issued by the State commissioner of health, respondent "did on October 19, 1918, have his hotel and bar open and was engaged in serving intoxicating liquors to at least nine persons."

This charge was satisfactorily proved by the testimony of a State policeman and was virtually admitted by the respondent, who, in *flagrante delictu*, said to the officer in effect, "You have got the goods on me, but I am a married man with nine children, and the brother of a State policeman."

The suggested excuses should have constrained active conscience to observe and not to violate a mandate involving the health of his own family and allegiance to authority.

Nevertheless, on the purely human side of the proposition, it is not difficult to understand that much better consciences than the one possessed by respondent would succumb to the strain of losing on a moment's notice the livelihood supporting such a family.

In these direful days of war and pestilence, we are all slowly learning in travail the lesson which seems strange in the United States, of implicit obedience to superior authority whatever private catastrophe may ensue therefrom.

The license is revoked *pro tanto* by suspension until further decree on application and hearing, after the proper health authorities shall have vacated the said order; costs to be paid by respondent.

Court of Common Pleas of Luzerne County.**O'HICKEY v. FLICK.**

Scire facias—Mortgagor and vendor—True name and incorrect name—Notice—Terre tenant—Mortgagee.

Purchaser of land from grantor signing his true name without middle initial, should take notice of prior recorded mortgage given on same land by same individual signing a middle initial that did not belong to his name. Either terre tenant or mortgagee, both innocent persons, must suffer loss. Mortgagee cannot be charged with negligence in relying on grantor's own word, signature and solemnly recorded act, nor be required to search ancient church records, city directories, or make inquiry of grantor's relatives. As index would have revealed name, with initial, with reference to mortgage on identical property, terre tenant was thus put upon inquiry respecting identity of vendor with mortgagor.

Motion by terre tenant for judgment non obstante veredicto.
Common Pleas Luzerne county. No. 207, March term, 1914.

FULLER, P. J., 1917.—This action was *scire facias* on mortgage, against the mortgagor as defendant and against his subsequent purchaser as terre tenant, judgment having been taken on two nihilis against the mortgagor and the action having been tried against the terre tenant with verdict by direction of Court in favor of the plaintiff.

The specific abstract question in the case is whether a purchaser of land by deed from a grantor signing by his true name without a middle initial, should take notice of a prior recorded and indexed mortgage given on the same land by the same individual signing with a middle initial which did not belong in his name.

Concretely stated, the question is, whether this terre tenant, who bought the land in 1908, from a man signing his true name in the deed, Herman Bergold, took title subject by constructive notice to a prior mortgage given, recorded and indexed in 1906, from the same man, signing his name Herman A. Bergold, which middle initial "A" did not properly belong in his name.

The clearly established facts on which we gave binding instructions for the plaintiff mortgagee, are (1) said Bergold was born in 1862, and received in baptism the same year the name of Christian Herman Bergold, but the "Christian" was dropped, leaving only Herman, by which he was commonly called and

known in the family and by general usage, after birth in 1863 of a brother who received in baptism the name of Christian I. Bergold; and the said Herman never properly had in his name any middle initial at all, although he sometimes signed his name with a middle initial "E"; (2) nevertheless, in 1906, when he gave this mortgage, he stated his name to be Herman A. Bergold, in which name the mortgage was accordingly drawn, executed, acknowledged, recorded, and indexed in favor of this plaintiff, who took the same and loaned her money thereon in good faith and in ignorance of any mistake in the name; (3) the mortgaged property consisted of an undivided one-tenth interest, which came to the mortgagor by inheritance from his father under will to "children", not mentioning names; (4) in 1908 the same Bergold, joining with other heirs, conveyed his said interest for a valuable consideration, signing the deed by name of Herman Bergold, to this terre tenant, who had no actual knowledge or notice of the mortgage or of the true name, but relied upon a certificate of the recorder that there were no mortgages in the name of Herman Bergold as specified in the praecipe for search.

Under these circumstances one of two innocent persons must suffer a loss, either the mortgagee or the terre tenant, and we have no hesitation in thinking at least, that it should be the latter, unless authority is very clear that a person who loans money in good faith and without negligence, on the security of a mortgage, shall suffer loss from the wrongful act of a mortgagor who writes into the mortgage its destruction by the simple use of a wrong middle initial.

This is not the case of a judgment signed by true name "John M. Gruver" but indexed "John Gruver", as in *Woods v. Reynolds*, 7 W. & S. 406, leading case upon the subject; nor of a judgment signed and indexed "Daniel Murphy" against an individual named "Daniel J. Murphy", in which the title stood as in *Crouse v. Murphy*, 140 Pa. 335; nor of a judgment signed by true name "W. A. Black" but indexed "W. G. Black" as in *Hutchinson's Appeal*, 92 Pa. 186; nor of a judgment signed by true name "D. T. Lewis" but indexed "D. S. Lewis" as in *Peck's Appeal*, 11 W. N. C. 31; nor of any other authoritative judgment instance in which a judgment creditor has been shouldered with the responsibility of seeing that his judgment is properly entered and indexed, and with the loss caused by his negligence in that re-

spect rather than one who has been misled and is in no default whatever; but it is the case of a mortgagee who has in good faith and without negligence taken a mortgage in the very name given and signed by the mortgagor himself, which mortgage was properly recorded and indexed in that name, on land acquired by descent and not linked of record with his name at all.

It would be a very harsh conclusion to charge the mortgagee with negligence for relying upon the man's own word, signature, and solemnly acknowledged act, as to his true name, particularly when that name was not discoverably connected with the record title. She ought not to be required to investigate the ancient church records of baptism, confirmation or communion, or the city directories, or the private business transactions brought into evidence, nor to make inquiry of brothers and sisters whose information would be no better than his own.

Of course, the governing principle declared in the judgment cases, of the creditor's duty to see to proper entering and indexing, is not pertinent in this case, in which the mortgage was properly entered and indexed in the name by which it was signed.

Undoubtedly it is the duty of a mortgagee, as of a judgment creditor, and so declared in *Prouty v. Marshall*, 225 Pa. 570, to see that his instrument is properly recorded, but it could only be properly recorded in the name by which it is signed, as was done in the case at bar, and was not done in the case just cited, where a mortgage signed "L. J. Marshall" was entered and indexed "S. J. Marshall", constituting a mistake in the first initial which obviously destroyed the efficacy of the record as notice.

We are unable to perceive any reason in the present case why the terre tenant could have been excusably misled, for he was no better advised of the true name than was the mortgagee, and as the index would have disclosed the name of Herman A. Bergold, with reference to a mortgage upon the identical property, he was thus fairly put upon inquiry respecting the identity of his vendor with the mortgagor.

The case then resolves itself into the proposition of a loss to be suffered by either the mortgagee or the vendee, who are equally innocent in fact perhaps, but the former is prior in time and the latter has enjoyed the better opportunity for information.

From every point of view, notwithstanding the forceful argument of counsel for the terre tenant, to which, for want of time, we cannot do full justice, we conclude that the verdict was properly directed in favor of the plaintiff, and the motion for judgment *non obstante veredicto* is therefore denied, with exception granted accordingly.

(Affirmed by Supreme Court, July 10, 1917.)

M. C. Gaertner, Jr., T. F. Farrell, for plaintiffs.

Paul Bedford, F. A. McGuigan, for defendant.

REILLY *v.* CITY OF WILKES-BARRE.*Contract—Sewer work—Lump sum—Unit measurements.*

Where municipality enters into contract for sewer construction with flat sum named for the work but provision for periodical payment based on unit measurements per lineal foot and cubic yard, and retention of percentage of each payment until completion of work, balance due at completion to be based on difference between totals paid in unit measurements and entire sum due on such basis—flat sum named is regarded herein as approximate and to be affected to greater or less amount by measurements. This construction strengthened by use of words in contract specifying prices and measurements “in greater or smaller quantities.”

Motion for a new trial. Common Pleas Luzerne county. No. 351, June term, 1915.

FULLER, P. J., March 15, 1917.—Although this case has just been submitted to us on the motion for a new trial and involves a difficult question, counsel earnestly request a speedy decision, which will permit review on appeal this year; and while compliance prevents more than a bare statement of the question involved, without any satisfactory discussion thereof, we feel disposed to comply with the request because we are assured by counsel that only one complaint will be urged on the appeal, namely, our construction of the contract forming the foundation of suit.

We construed it to impose liability upon the city not for the flat sum of \$48,980.59, as claimed by the plaintiff, but for such lesser or larger sum as would result from applying the specified unit rate prices to the actual measurements of work done, as claimed by the defendant.

We gave the jury binding instructions in favor of the defendant on this subject, and, of course, if we were wrong a new trial should be granted, or the verdict remolded from intrinsic data.

Four of the five judges on this bench now concur in the construction claimed by the defendant, and, therefore, decide that a new trial should not be granted.

The action was brought to recover a balance claimed on contract for building a sewer.

By that contract, dated October 25, 1912, plaintiff agreed to furnish all labor and materials to excavate and back-fill trenches and to lay sewer pipes therein, on certain streets in the city of Wilkes-Barre according to plans and specifications and plaintiff's proposal on file in the city office, and attached to the contract;

and the defendant agreed to pay for completing said work in accordance with plans and specifications \$48,980.59, in the manner provided by the specifications. Thus the proposal and specifications became a part of the contract and must be considered in construing its terms.

In the proposal the plaintiff offered "to excavate and back-fill sewer trenches and to furnish sand and cement and lay pipe in trenches in accordance with plans and specifications of the same for the following prices, and in greater or smaller quantities, viz.:

* * *

Then follow some seventeen items specifying different lengths and depths of trenches, cubic yards of different material, such as hard-pan, rock, shale and slate, length and diameter of pipes, number of manholes, etc., with unit prices per lineal foot, cubic yard and manhole, all carried out, footed up and added together, amounting to the said sum of \$48,980.59.

This proposal was on a standard printed blank used by the city, and contained the following: "Bidders will fill in the cost per foot or yard of each item as indicated on the above blank, carry out the total cost of such items, and add the bid, showing total cost of work according to their proposal"; as was done in this case.

It was also provided, "all work and materials to be paid for shall be measured by the engineer and his assistants according to the plans, specifications, and the lines given on the ground."

It was also provided that in rock work certain considerations should determine whether the estimate should be for rock, shale or slate; "these estimates and the decision and judgment upon which they are based to be final and conclusive."

It was also provided that the amount of hard-pan allowed will be based upon calculation made for a trench of the required width with perpendicular sides, no allowances being made for slopes.

It was also provided that the contractor shall remove all surplus material at his own cost and expense.

It was also provided that the contractor shall construct manholes wherever directed by the city engineer.

It was also provided that the contractor should not be entitled to pay for extra work unless ordered in writing and prices agreed upon previous to commencement of same.

It was also provided that at the end of each month during the progress of the work the engineer shall make an estimate of the total amount of work during that month and the valuation thereof at the prices stipulated and recorded in the contract, which estimate shall be a warrant for payment of ninety per cent. (90%), the other ten per cent. (10%) to remain unpaid until completion, and then to be payable within ninety days from completion and acceptance.

It was agreed that the work should begin November 1, 1912, and be completed October 1, 1913, but in fact it was not begun until November 12, 1912, or completed until December 9, 1914, although no defense is interposed on the ground of this delay.

The plaintiff received payments on monthly estimates of the engineer from time to time, twenty-three in all, forming a connected series, with balances carried forward from one to the other, based upon actual measurements and upon prices specified in the proposal, amounting altogether to \$34,046.04.

Ten per cent. was retained out of each monthly estimate as agreed, and upon completion and acceptance of the work by the city, December 9, 1914, the final estimate was \$4,971.59, which the city offered and still offers to pay.

There were some minor questions in the case which are not in controversy at this time and need not be mentioned or considered.

The plaintiff in substance claimed that on his construction of the contract he was entitled to the flat sum of \$48,980.59, regardless of measurements, with credit of \$34,046.04, leaving a balance of \$14,934.55, subject to some further credit connected with the minor questions just mentioned.

The defendant, on the other hand, claimed that on its construction of the contract the limitation of liability was actual measurements and specified prices, that is \$39,017.63, less payments \$34,046.04, leaving \$4,971.59, as set forth in the final estimate above mentioned, with some addition thereto connected with the minor questions aforesaid.

Thus the controversy involves a construction of the contract as between \$48,980.59, claimed by the plaintiff, and the unit basis claimed by the defendant.

In our charge to the jury we adopted and we still hold to the latter.

The defendant offered evidence of a contemporaneous similar contract in which the plaintiff himself adopted and acted upon the defendant's construction, but we rejected the evidence on the assumption, which we still make, that the contract taken as a whole was free from ambiguity.

Plainly, we think, the contract was to do the work for \$48,980.59, if the measurements amounted to so much at the specified unit prices.

The measurements stated in the proposal were estimated as closely as they could be in advance. If they fell short, the cost would be correspondingly less; if they went above, the cost would be correspondingly more.

No other construction would be fair to either party.

No other construction accords with the language of the different provisions heretofore quoted, accompanied by the specification of prices.

Why specify prices or measurements "in greater or smaller quantities" if a flat payment of the total amount is contemplated?

Without further discussion, which the case no doubt deserves, but which we have not the time to bestow, we concur with the trial judge that the contract clearly contemplates payment not of a flat \$48,980.59, but for aggregate actual measurements on prices specified.

Therefore the motion for a new trial is denied; Judge Garman dissenting.

(Affirmed by Supreme Court May 28, 1917.).

John McGahren, for plaintiff.

C. F. McHugh, E. C. Jones, for defendant.

MUNDY *v.* GAERTNER *et al.*

Poor board—Collection poor taxes—Acts 1901, P. L. 578, and local laws.
Act June 20, 1901, P. L. 578, relating to collection of poor district taxes by city treasurers, in cities of the third class, does not abrogate provisions of various local laws creating and regulating Central Poor District, and which give to poor board authority to appoint collector. Section 15, Act 1901, preserves operation of local laws relating to collection of poor taxes. Under local laws poor district still retains power—uninterruptedly exercised for over fifty years—of appointing its own collector of taxes.

Petition for mandamus, return, demurrer. Common Pleas, Luzerne county. No. 212, July term, 1917.

FULLER, P. J., July 31, 1918.—The case involves the simple question of law, who has the right to collect poor tax in Wilkes-Barre, a city of the third class.

The plaintiff, as city treasurer thereof, claims the right under Act of June 20, 1901, P. L. 578, "relating to the collection of city, school and poor taxes in the several cities of the third class in this Commonwealth, and providing that the city treasurer of each of said cities, by virtue of his office, shall be the collector of the said several taxes," etc., and by this proceeding he seeks to compel recognition of this right by the defendants, who compose the poor board of the Central Poor District, embracing among other municipalities the said city.

The defendants, by their return to the alternative mandamus,

deny the plaintiff's right and set up their own power, which they have exercised under local laws, to appoint the rightful collector.

By plaintiff's demurrer to the return the specific single question of law is submitted, whether the plaintiff by virtue of his office as city treasurer, has the right of collection against the exercise of authority by the poor board.

His claim depends upon the said Act, which provides, in Section 1, "that the several city treasurers hereafter elected in cities of the third class in this Commonwealth, by virtue of their office shall be the collectors of all the city, school and poor taxes assessed or levied in their respective cities and shall perform the duties and be subject to the hereinafter provisions of this Act."

The claim of the poor board is based upon certain local laws creating and governing the Central Poor District, viz.: Act of April 2, 1860, P. L. 538; Act of March 1, 1862, P. L. 63; Act of April 4, 1863, P. L. 298; Act of April 8, 1864, P. L. 326; Act of March 9, 1867, P. L. 376, and Act of April 10, 1873, P. L. 753.

"By these Acts" (quoting from the brief of the plaintiff himself) "the poor directors are given power to levy taxes, appoint collectors, issue duplicates, and make settlement with the collectors after they have collected the taxes."

If these provisions of local law are still in force, they govern the situation and put the plaintiff out of court.

On principle, of course, they are preserved against a general law unless expressly or by necessary implication repealed thereby.

The Act of 1901, *supra*, does not undertake to repeal any local law either expressly or by implication. On the contrary, it expressly preserves such laws by Section 15, viz.: "All general Acts or parts thereof inconsistent herewith are hereby repealed, but this Act shall not apply to any taxes the collection of which is regulated by a local law."

The plaintiff, however, contends that the local laws in question do not regulate "collection" and hence are entirely consistent with the general Act.

We will allow him to state his own position on the subject as set forth in the brief of his learned counsel:

"Our position is that the Legislature by the Act of 1901, as amended, provided a complete system for the collection of poor taxes in cities of the third class, and that the poor taxes assessed and levied by the Central Poor District are not excepted by the provisions of the fifteenth section of the Act, because they are not 'taxes the collection of which is regulated by a local law.' Nothing in any of the several Acts of the Assembly relied upon by the defendant provides for or regulates the collection of poor taxes. The several Acts referred to as local Acts in the return of the defendant, taken together, constitute the charter of 'The Central Poor District.' By these Acts the poor directors are

given power to levy taxes, appoint collectors, issue duplicates and make settlement with the collectors after they have collected the taxes. But the Acts do not make any specific provision whatever for or confer upon the collector powers for the collection of the taxes from the taxpayer.

The fifth section of the Act of March 12, 1862, P. L. 64, expressly provides for the collection of the tax, and that the power of the collector to enforce payment of the same shall be the same as provided by law for the collection of county taxes, thereby clearly referring the question of the collection of the taxes and the power of the collector to enforce payment thereof, to the general law as provided for the collection of county taxes. Bearing in mind the purpose of the Act of 1901 to be to formulate a uniform system for the collection of all such taxes by a single collector, and the decisions of the Court herebefore referred to, holding the legislation to be general and remedial, we submit that there is no rule of law that requires an interpretation of the fifteenth section as excepting any taxes other than such as fall within the expressed words of the exception, viz.: "Taxes the collection of which is regulated by a local law."

This seems to be self-contradictory of the contention that the local laws do not regulate collection, showing that they have a large hand in the operation, and particularly in the very pertinent respect of appointing the collector.

The authority of the poor board to appoint the collector has never been challenged or doubted so far as we know, either before or since the Act of 1901, until the present proceeding.

Nor is the plaintiff helped by the Act of May 29, 1917, P. L. 315, amending in certain respects the Act of 1901, *inter alia*, Section 1, aforesaid to read: "That the several city treasurers hereafter elected or appointed in cities of the third class of this Commonwealth by virtue of their office shall be the collectors of the city, school and poor taxes assessed or levied in their respective cities by the proper authorities therein."

Section 15 above quoted from the original Act is not affected at all by the amendment, which so far as concerns Section 1 was only enacted to remove a possible cloud upon the status of a city treasurer appointed and not elected. (See discussion of this subject in our decision, Mundy *v.* Myers *et al.*, No. 472, October term, 1916.)

Our conclusion, therefore, is that under the local law the poor board still enjoys the same full power to appoint the tax collector which it has uninterruptedly exercised for more than half a century.

Hence the demurrer is overruled and judgment is now entered on the record in favor of the defendants.

J. T. Lenahan, for plaintiff.

C. E. Keck, W. A. Valentine, for defendants.

ST. P. & ST. P. EV. LUTH. SLAV. CH. *et al.* v. HUDRY *et al.*
Equity—Jurisdiction—Deposition of pastor of church—Restoration of church property to trustees.

1. Equity will intervene on bill by trustees of incorporated church to restrain retention and use of church property, etc., by pastor who has been duly deposed, and deposition approved by higher church court. And thus where main facts averred in bill are admitted and demurrer rests upon technical grounds alone.
2. Equity is appropriate in circumstances above to restore use of church property promptly to those entitled, avoiding long delay of law trial.
3. Duly constituted trustees may use corporate name of church in any legal process which they find it necessary to undertake, and they may institute such process independent of lay-members.
3. Bill averring that trustees were duly elected at regular meeting and are holding office in accordance with charter and by-laws is sufficient to call for answer.

Bill and demurrer. Common Pleas Luscerne county. In Equity.
No. 4, May term, 1918.

STRAUSS, J., July 16, 1918.—This bill was filed by the individual plaintiffs as trustees for the incorporated St. Paul, etc., Lutheran Church to restrain the Rev. John Hudry from occupying the church building, from exercising pastoral functions therein, from paying out funds of the church or expending them, and that he and the other defendants account for moneys paid to him on account of salary, or for any services to or for the church since January 6, 1918, and that the defendants be commanded to deliver up all the church property into the possession of the plaintiffs for the use and purpose of the congregation in accordance with its by-laws and constitution.

The plaintiff church was incorporated March 9, 1903, charter recorded in Charter Book 6, page 35, "for the purpose of worshipping according to faith, doctrine, discipline and usage of the Evangelical Lutheran Church," and by its charter holds its property, real and personal, subject to control by its lay members. It was and is connected with the Slovak Evangelical Lutheran Synod of the United States. It acquired land in Hazleton and erected on it a church building.

Rev. John Hudry, defendant, was its pastor during a number of years until January 6, 1918. Then he was deposed in accordance with the by-laws of the plaintiff church, after formal and explicit charges of "unchristian and immoral life" had been made against him. These charges were duly served upon him

and he was cited to answer at a duly called and properly constituted regular meeting of the congregation of the plaintiff church. He opened this meeting in the auditorium of the church in the manner required by the by-laws, but at it he made no answer to the charges. Thereupon after hearing the proofs and allegations concerning these charges, after due consideration and deliberation the congregation by an unanimous vote adjudged him guilty and he was thereupon deposed as pastor of the church and removed from his said office, and his pastoral duties were then legally ended, the votes thereon being duly taken and recorded, and he was at once, January 6, 1918, duly and formally, by writing, personally served on him, notified of the congregational action.

This action the plaintiff congregation duly brought to the attention of the Slovak Evangelical Synod.

The Synod, then, in accordance "with its formula of government," referred the charges that defendant was "leading an unchristian and immoral life" to a committee of five ordained ministers for formal investigation. Due notice of the time and place of hearing and citation to appear and answer having been served, the matter was duly heard, the committee found him guilty as charged and the Synod, acting under its power and authority, approved the action of the church in deposing him and entered a decree dated February 28, 1918, directing him "to vacate the pastorate at once and to surrender to the congregation and the trustees thereof possession of the church property at the corner of Alter and Eighth streets, in Hazleton, and all property of said church and congregation in his possession."

Notwithstanding all these facts, Hudry usurps and holds possession of the church property, its pulpit and corporate seal, and he and the other defendants who pretend to be officers of the plaintiff church, have undertaken against the will of the congregation and contrary to the constitution, charter and by-laws of the plaintiff church and of the Synod to withdraw the congregation from the Synod and to hold it as independent of the Synod.

The other defendants are aiding, abetting, encouraging and conspiring with said Hudry to forcibly hold possession of said church property and to support and pay Hudry his salary out of the church funds and to usurp the offices of trustees of said

plaintiff, and they have refused to deliver the church keys, records, lot and building to the duly constituted board of trustees who have united herein as plaintiffs.

The bill also declares that Michael Tomascko and the other five individuals were duly elected trustees of the plaintiff corporation at a regular meeting of the plaintiff church held January 6, 1918, and are entitled to hold the office of trustee in accordance with the charter and by-laws of the plaintiff church, and, as such, to administer, hold, control and care for the property of the church for the use of the said congregation. They are also members thereof and bring this bill of complaint in behalf of said church.

Such are the averments of the bill which the demurrer concedes to be true, but asserts to be insufficient in equity to sustain the prayers for injunction for twenty different reasons. Some of these deal with omissions of averments from the bill which, if relevant, ought to be included in an answer.

The grounds of demurrer which seem to us to raise distinct issues of law may be classified as follows:

1. The church is not made a party in legal manner.
2. There is adequate remedy at law.
3. The bill is multifarious.
4. The bill contains no sufficient averments of corporate action by the plaintiff or of action by a majority of the lay-members authorizing the filing of this bill.

1. An inspection of the bill shows the church to be the plaintiff, made so by the trustees, who are also plaintiffs, and who by the admission arising out of the demurrer were duly elected at a regular meeting of the plaintiff church on January 6, and are entitled as trustees, in accordance with the charter and by-laws of the plaintiff, to administer, hold, control and care for the property of the church for the use of said congregation. They may, therefore, by virtue of their office, whenever it becomes necessary for the protection of the property of the congregation, use the corporate name of the church as a plaintiff in any legal proceeding which they find it necessary to undertake. So independently of co-operation by the majority of lay-members they may institute such a proceeding. Though it is true that all parties interested should be named in the bill, as shown by cases

cited in defendants' brief, yet this does not mean that it is necessary to name upon the record individually the numerous members who constitute the plaintiff church. Any lay-member who desires leave to participate either in defense or in support of this proceeding begun by the trustees would be permitted upon his own petition to intervene, and the defendants claiming to be members of this church have the fullest right to interpose every possible defense that any individual lay-member may suggest.

The most that can be made out of those cases is that the church corporation ought in such a litigation as this appear upon the record either as plaintiff or defendant. *Krecker v. Shirey*, 2 D. R. 24. The same decision is also authority for the proposition that a bill which alleges that corporate action was "duly" taken, means "properly," "fitly," "regularly," "in a suitable or becoming manner according to law," and that where this is averred, it is not necessary to set out all the details which describe the several steps that resulted in the corporation's act. The averment of the bill being that the plaintiffs were "duly" elected trustees at a regular meeting of the plaintiff church and are entitled to hold the office of trustee in accordance with the charter and the by-laws, the bill is sufficient in that respect to call for an answer; and this rule is also applicable to those averments in which the plaintiffs set forth that Hudry was deposed in accordance with the by-laws after formal and explicit charges, etc., which were "duly" served upon him, and which after due consideration and deliberation of the congregation at a meeting "duly" called and properly constituted where votes upon the charges were "duly" taken and recorded, of which he was "duly" and formally, by writing, personally served and notified, whereby he was deposed and his pastoral duties were then "legally" ended.

2. As to adequate legal remedy: This church is entitled to the uninterrupted use of its church edifice for public worship, and a pastor who had, after what was admittedly due trial, been removed from his office by vote of the congregation regularly taken according to its laws, will not be sustained when he injects himself and a faction that may be supporting him between the congregation and its legal rights of peaceable possession of its building.

The averments concerning usurpation of the office of trustee

by defendants other than Hudry are merely incidental to the main controversy. If this were a suit between the individual plaintiffs and these individual defendants as to who was duly and legally elected to the office of trustee, the plea of adequate remedy at law by *quo warranto* would undoubtedly be a good one. But this controversy is not of that nature. The bill avers and the demurrer admits that Hudry and the other defendants had conspired to hold possession of the church and to usurp the office of trustee and to keep in their possession the church keys, records, lot and building, and that as a result thereof the defendant, Hudry, is in possession of the property, its pulpit and corporate seal, and he with the other defendants has undertaken, against the will of the congregation and contrary to its constitution, to withdraw the congregation from the Synod.

To shut our eyes to the legal admissions resulting from the demurrer and to seek technical objections to prevent a trial of the main question upon its merits, would be to deny to these plaintiffs the remedy in equity (so frequently administered in similar contests that it is unnecessary to cite authorities) to which, upon these facts, if they should be ultimately so proved on trial, they would undoubtedly be entitled. Neither ejectment nor trespass for damages would be an adequate remedy.

3. The bill is not multifarious. The definite elements included in this bill as the cause for complaint, all taken together, make a single cause of action. As we have already indicated the possibility of direct controversy between the plaintiffs and some of the defendants concerning title to an office does not make the bill multifarious, because that is a mere incident to the main cause of complaint.

4. As already intimated, we regard the averments in the bill sufficient to justify the trustees in using the name of the church for the purpose of protecting the church property which is in their charge for administration. But even if it were necessary by the terms of the bill to open the doors for the lay-members to become parties to this suit, that could be covered by simply amending the bill through an additional statement "that the plaintiffs sue as well for the church as for such of the lay-members constituting it as desire to join herein." But in our opinion no such amendment is necessary and none of the technical objections

that have been interposed are sufficient to excuse these defendants from answering the complaint that has been made against them.

Demurrer overruled and defendants given leave to answer within period required by the Equity Rules.

J. Q. Creveling, G. B. Kleeman, for plaintiff.
Adrian H. Jones, for defendant.

PEARSE *v.* THE WILKES-BARRE RAILWAY CO.

Negligence—Contributory negligence—Clear view of tracks.

Where plaintiff is struck by car at railroad crossing, despite some evidence of no lights on car, but where crossing was well lighted and clear view of tracks in both directions, contributory negligence will be imputed.

*Motion for judgment n. o. v. Common Pleas, Luzerne county.
No. 411, March term, 1916.*

STRAUSS, J., August 2, 1918.—The plaintiff in this case was struck by defendant's car at a crossing on an intersecting street. She testified that she looked up and down the track and failed to see the car coming and there was some evidence that there was no signal or lights on the car, but it was shown and not contradicted that at the crossing an electric light was burning and that the car could be seen at a distance of several hundred feet from the crossing. No evidence was introduced to prove any obstruction to a full view.

The jury found a comparatively small verdict for the plaintiff.

Now that we have carefully examined the evidence as transcribed by the stenographer, we find it to be a clear case within the rule laid down in *Carroll v. Railroad Co.*, 12 W. N. C. 348, cited in *Blight v. Railroad Co.*, 143 Pa. 13: "The injury received by the plaintiff was attributable solely to his own gross negligence. It is vain for a man to say that he looked and listened, if in despite of what his eyes and ears must have told him he walks directly in front of a moving locomotive." Had the plaintiff looked down the railroad toward Kingston she could not have failed to see the oncoming car. Her testimony is only reconcilable with the assumption that she was wool-gathering at the time, thinking of something beside the danger to which she was exposing herself by attempting to cross the track under these circumstances.

Judgment for the defendant notwithstanding the verdict.

James McQuade, A. O. Kleeman, for plaintiff.
J. T. Lenahan, Paul Bedford, for defendant.

PALMER v. EAST BOSTON COAL CO.

Negligence—Damages—Brake rod—Defective condition.

Where car-runner is fatally injured by fly-back of brake rod, and subsequent examination shows defective ratchet and "dog" of brake, non pros asked on testimony of single fellow-workman that at moment of accident man injured was not in position to use brake, will be refused, and weight of facts as to negligence left to jury.

*Motion for judgment n. o. v. Common Pleas, Luzerne county.
No. 173, January term, 1915.*

STRAUSS, J., August 2, 1918.—This is an action by a mother for damages resulting from the death of her son. He was a car-runner employed by the defendant at its colliery. It was his duty to run empty cars under the chutes at the breaker for loading, and to run them after they were loaded to a scale nearby to be weighed and then to a siding where the cars were left awaiting transportation from the colliery by the railroad company.

The running of a car was controlled by the car-runner through the operation of a brake which had a ratchet wheel around the brake shaft at the platform and a "dog" which is an "S" shaped bar of iron fastened to the platform in such way as to move upon a pivot at the center of the "S", by means of which it may by the foot have one end of the "S" forced against the cogs of the ratchet, thereby holding the brake firmly when it is "on". In order to operate this "dog" it is necessary for the car-runner to stand upon the platform so that his foot may be brought into contact with the "dog" and cause it to engage the ratchet and to hold the brake. For the purpose of gaining leverage on the brake and putting it "on" firmly, a brake rod, stick or iron, is in common use.

On behalf of the plaintiff it was shown that on October 2, 1914, the deceased was injured while at work, he himself stating that he had been struck by a brake stick. Very shortly after the injury he was taken to the company office, where he was attended by a physician, and from which place he was taken to his home a little later than 2 o'clock in the afternoon. As the result of information obtained from him, the plaintiff (his mother) and her husband (his step-father) went to the colliery and found on a D., L. & W. gondola car, his cap and gloves. She climbed on the car at the end at which the brake was placed, found the cap and gloves, and then examined the ratchet wheel. She testified

that it was an old rusted brake and that a cog was broken off; the husband testified the "notches" were broken off the wheel and part of the "dog" was broken off. They also testified that the word "shop" was written on the car with chalk and it was shown that this word indicated that the car had been found defective and should have been sent to the shop for repairs. The boy suffered considerable pain and was so ill that the mother later in the day sent for the doctor who had attended him at the company's office. The boy died as the result of an internal hemorrhage, according to the doctor's opinion, the next morning (October 3.)

There was no other evidence on the part of the plaintiff as to the cause of the accident; no eye witness was called. A compulsory non-suit was refused, because, though it had not been shown just how the accident happened, there were circumstances which (taken with a presumption unrefuted by evidence that the deceased had performed his duty properly by using the appliance provided for the purpose, viz.: the ratchet and dog) might at that stage of the trial have fairly furnished a foundation for the verdict.

The circumstances to which we refer are a broken ratchet, the finding of the cap and gloves on the particular car, and the declaration of the deceased immediately after the injury that he had been struck by a brake stick.

The presumption to which we refer is that "springing from the love of life and the instinct of preservation which furnish so high a motive for care in any reasoning being, that they will stand for proof of care until the contrary appears." *Cleveland & Pittsburg Rwy. Co. v. Rowan*, 66 Pa. 399; *Scranton City v. Dean*, 2 W. N. C. 467.

For the defendant a witness, Stephen Marsden, testified that he saw the deceased just before the accident. The deceased was then sitting on the head end of the car coming down from the scale and had been requested by Marsden to stop the car so that he would not bump "against us as we were switching below, and he stopped the car. As he stopped the car I was a little ways from it and he hollered and I asked him what was the matter and he said he was hit with the brake iron." Marsden also testifies that it was impossible for the deceased to operate the brake and at the same time control the ratchet on the platform

from the place where he was sitting, as he could not from that position reach the ratchet.

Based very largely upon this testimony it was argued in support of this motion that all of the evidence taken together fails to show any negligence on the part of the defendant. Marsden was practically an eye witness and we can assign no good reason why the jury did not accept his testimony. Had they done so, they would undoubtedly have returned a verdict for the defendant. The case was submitted to them upon the simple question whether the deceased had been injured as a result of the broken ratchet or "dog", and, of course, if the deceased was operating the brake from a point at which it was impossible to operate that device, then the presence or absence of the device, whether whole or broken, bore no causal relation whatever to the accident.

It has been decided many times that "the presumption of a fact in law which carries a case to the jury necessarily leaves them in possession of it. True, the evidence to rebut the presumption may be very strong, yet it is a matter for the jury and not for the Court." *R. R. Co. v. Weiss*, 87 Pa. 447; *Devlin v. The Light Co.*, 198 Pa. 583; *McCafferty v. The Railroad Co.*, 193 Pa. 339; *Rauch v. Smedley*, 208 Pa. 175; *Simons v. The Railway Co.*, 254 Pa. 509.

Unless, therefore, we were wrong in overruling the motion for compulsory non-suit, the case at that stage was necessarily for the jury; and thereafter only the jury could decide whether the evidence offered by the defendant overcame the inference of negligence which they might have been justified in finding upon evidence offered on behalf of the plaintiff.

Motion for judgment *n. o. v.* denied.

James McQuade, E. A. Lynch, for plaintiff.
P. F. O'Neill, F. W. Wheaton, for defendant.

COM. OF PENN'A, VELKEY *v.* KLINGER *et al.*

Affidavit of defense—Claim against estate—Adjudication.

Where liability of administrator of estate is decreed on claim presented in Orphans' Court, technical defense that true copy of bond is not attached to plaintiff's statement (filing of bond admitted) denying date fixed by Orphans' Court for payment, and averring general insufficiency of form of statement, will not avail.

Assumpsit. Rule for judgment for want of a sufficient affidavit of defense. Common Pleas, Luzerne county. No. 6, March term, 1918.

GARMAN, J., September , 1918.—On February 5, 1913, the defendant, Joseph Klinger, was appointed administrator of the estate of Mary Klinger, deceased, and filed a bond with defendants, Demshock and Palermo, as sureties.

On October 26, 1917, the Orphans' Court of Luzerne county found that the estate of said decedent was indebted to said Mary Velkey in the sum of \$86.50, which amount said administrator had refused and neglected to pay to said Mary Velkey, and to recover which sum she has brought this action against the said administrator and his sureties.

Defendants filed affidavit of defense denying that a true copy of the bond was attached to plaintiff's statement; admitting the filing of the bond in the penal sum of one thousand dollars; admitting the jurisdiction of the Orphans' Court over the subject matter of the bond, but denying that the Orphans' Court by their decree or sentence filed did limit and appoint on October 26, 1917, said Mary Velkey, the use plaintiff aforesaid, to receive and the said administrator, Joseph Klinger, to deliver and pay unto her said sums of money; and averring that the statement was wholly insufficient in form and substance to charge the sureties with liability on the bond.

The exceptions to the affidavit of defense are:

That defendants deny generally the allegations of the claim and do not answer specifically each allegation of the fact of which he does not admit the truth;

That said affidavits of defense were not served upon plaintiff or her attorney within fifteen days from the day the statement of claim had been served upon defendants;

That the denial that the copy of the bond attached to plaintiff's statement was not a true copy is no defense, because the statement contained a particular reference to the record of said bond in the register's office in Bond Book 17, page 337;

That the record of the decree or sentence in the Orphans' Court is sufficient evidence of such decree or sentence in this action at law in the Common Pleas of said county and cannot be attacked collaterally;

That demand by plaintiff is immaterial, this action being itself a demand, plaintiff's right of action being complete when the liability of the administrator was ascertained by the decree of the Orphans' Court.

The defense in this case is entirely too technical. The liability of defendant, Klinger, was judicially ascertained and in effect decreed. Payment not having been made, the sureties become liable to action.

Without further discussion the exceptions are sustained and the prothonotary is directed to enter judgment in favor of the Commonwealth and against the defendants for the amount of the bond, to-wit: \$1,000, and also for the use plaintiff, Mary Velkey, for the said sum of \$86.50, with interest from January 17, 1918, and costs of suit.

A. H. Jones, for plaintiff.

J. E. Jenkins, for defendants.

REDDINGTON v. LEHIGH VALLEY R. R. Co.

Common carriers—Railroads—Perishable freight—Delay—Damages.

1. Statement in suit for damages against railroad for spoiling of perishable freight through delay in transportation, should specify what the delay was, date of shipment and date of delivery, and should aver lack of reasonable dispatch, which defines liability for delay.
2. While wash-out might place on original carrier obligation to refuse perishable freight, it would not necessarily so affect forwarding carrier.

Rule to enter judgment for want of sufficient affidavit of defense. Common Pleas, Luzerne county. No. 493, May term, 1918.

FULLER, P. J., September 23, 1918.—The cause of action in this case is the alleged negligence of defendant, as a forwarding carrier of perishable merchandise, by injurious delay in transportation.

The statement avers that on August 16, 1917, a shipper in Philadelphia sent therefrom as freight, by way of the defendant railroad, to plaintiff at Wilkes-Barre, one barrel of turkeys and 150 pounds of meat, for which plaintiff received a bill of lading acknowledging delivery of same to defendant on that day; that by defendant's negligence in transportation and by long delay intervening between receipt and delivery of the merchandise, the same became spoiled, to the damage of plaintiff.

By the affidavit of defense, defendant admits receipt from its connecting carrier, the Philadelphia and Reading Railway Company, at South Bethlehem, at 11:45 p. m., on August 16, 1917, of the merchandise shipped from Philadelphia by way of said railway, on bill of lading issued by said railway company and attached to the affidavit of defense; but avers that on August 15, 1917, by act of God, a wash-out had occurred on its railroad between South Bethlehem and Wilkes-Barre, which prevented transportation over that railroad, compelling defendant to detour the shipment over the Delaware, Lackawanna and Western Railroad, whereby arrival at Wilkes-Barre was delayed until 9:50 p. m. on August 17; and the goods being perishable, and having been packed by the shipper without ice, became spoiled.

The bill of lading attached to the affidavit describes the merchandise as "perishable", but stipulates exemption of the carrier from liability for delay "caused by the act of God", or not amounting to the want of reasonable despatch.

It must be observed that while the statement is expressly predicated upon negligence by delay and not upon breach of the contract, it fails to specify what the delay was, merely averring the date of shipment without averring the date of delivery, and also without expressly averring the want of reasonable despatch, which defines the liability for delay.

The date of delivery, it is true, is supplied by the affidavit, namely, twenty-two hours after defendant's receipt of the merchandise at South Bethlehem, but the record fails to show explicitly that this would be unreasonable despatch.

The plaintiff seeks refuge from this condition of the record, in the argument that the defendant is not protected by an antecedent act of God, and that the defendant being unable by reason of the wash-out on August 15 to carry the merchandise over its own line on August 16, should have refused the merchandise until after notifying the shipper and receiving the latter's consent to make the detour by another railroad.

But the statement is not predicated on any such breach of duty; and, furthermore, while the argument might apply to the initial carrier at Philadelphia, it would not necessarily apply to the forwarding carrier at South Bethlehem, unless the shipper could then have obtained more expeditious transportation, which does not appear in the case, and which we might almost assume, by judicial notice, to have been unavailable.

The rule for judgment is discharged.

John McGahren, for plaintiff.
J. R. Halsey, for defendant.

COM. *ex rel.* SLATTERY, *v.* SANKO.

Practice—Trial—Absence of witness—Continuance—Rule of Court.

Continuance refused because absence of material witness is explained only by physician's statement, not sworn to, and physician after opportunity given does not appear, will not be available ground for new trial. Nor will new trial be awarded where Act March 31, 1860, P. L. 399, has been construed to relate to contract of sale, and where consideration of sales made and defendant's conduct thereto was submitted to jury, defendant having benefit of question of conscious violation of the law.

Quo warranto. Common Pleas, Luzerne county, No. 281, March term, 1918.

GARMAN, J., May 30, 1918.—The Commonwealth, through Frank P. Slattery, filed suggestion that John M. Sanko, a councilman of the borough of Swoyersville, and the owner of a hardware and furniture store in said town, furnished and supplied the said borough with merchandise and certain kinds of supplies and received remuneration and compensation therefor from the said borough and suggested a writ to show by what warrant he

claims to have, use and exercise the office, rights and powers of councilman for said borough.

A writ of quo warranto was awarded and so proceeded in that on May 6, 1918, the case came on before us for trial by jury in our Court of Common Pleas.

The verdict was in favor of the Commonwealth and defendant filed reasons for new trial, which we will now consider seriatim.

First reason. "The Court erred in permitting the trial of the case to go on without the wife of the defendant, who was a material witness, being present."

When the case was called for trial, defendant moved for a continuance on the ground of the sickness of his wife alleged to be important witness. The proof of sickness consisted of a physician's certificate, signed but not sworn to, and the sickness was denied by counsel for plaintiff. No effort was made to comply with Section 8, Rule L1, of Rules of Court, which provides:

"When application is made to the Court of Common Pleas for a continuance because of the absence of a witness, the party shall state, under oath, the facts which he believes the witness will swear to, the grounds of his belief that he will do so, the efforts made to procure his attendance, specifying the same minutely and particularly, and the grounds for believing that a continuance will enable the party to procure the testimony; which affidavit shall be filed of record in the case."

The alleged sickness was declared to have begun on Saturday preceding the trial. We allowed time until the afternoon session for defendant to produce the physician in court but defendant reported that the physician could not be present. We then required the trial to proceed.

Second reason. "The Court erred in refusing the first point of the defendant."

This point was, "Under all the evidence in the case the verdict must be for the defendant."

Being of the opinion that we should either have given binding instructions for the plaintiff or at least submitted the case as we did submit it to the jury, it will be impossible for us to sustain this reason.

Third reason. "The Court erred in refusing the second point of the defendant."

This point was, "If the jury believe that Mrs. Sanko, the wife of the defendant, is interested in the business conducted by him and was at the time of the alleged purchases by the municipality, the verdict must be for the defendant."

With the slightest inspection, it will be seen that this reason cannot be sustained. If defendant's firm sold supplies to the borough and defendant was interested in the transaction, the fact

that his wife was also interested cannot remove or condone his offense.

Fourth reason. "The Court erred in refusing the third point of the defendant."

This point was, "The mere purchase of supplies by the municipality from a store in which the defendant was interested, is not a violation of the Act of March 31, 1860, P. L. 399, unless the jury believe that the supplies were sold by the defendant in pursuance of a contract with the municipality."

We construe the Act to relate to a contract of sale and in this case submitted to the jury only a consideration of sales made, and defendant's conduct relating thereto, after defendant was informed that his bills had better not be made out in his name. He then had the benefit of the question of a conscious violation of law, and even this is of very questionable right. The fourth reason is not sustained.

Fifth reason. "The Court erred in refusing the fourth point of the defendant."

This point was, "There being no evidence that the defendant was in any way interested in any contract between the municipality and himself for the furnishing of any supplies, the verdict must be for defendant."

If we are right in our opinion that the Act of Assembly relates to a sale by this defendant to the borough, we could not affirm this point. Having no new light on the question, we refuse to sustain this reason.

Sixth reason. "The Court erred in placing too much stress upon the testimony of the plaintiff and not enough stress upon the testimony of the defendant."

A careful reading of our charge does not convince us of the correctness of this point, and, therefore, the sixth reason is not sustained.

Seventh reason. "The Court erred in not withdrawing a juror and continuing the case when Mr. Salsburg, attorney for the plaintiff, showed a check to the jury stating that it was a check paid to John M. Sanko by the Swoyersville borough treasurer or secretary for goods sold by Sanko."

Whatever were the facts upon which this reason is based, we do not find them made a part of the record or properly filed as required in such cases. But from our recollection of the circumstance alluded to, we are satisfied that our action thereon fully protected the defendant and was not error.

The motion for new trial is denied.

A. Salsburg, M. Salsburg, for plaintiff.

J. McQuade, for defendant.

BARTELS BREWING Co. v. MASLOWSKI.

Sci fa sur mortgage—Issue—Jurisdiction Common Pleas.

In expediting law process and avoiding useless delay and expense, Common Pleas will reinstate action of *scire facias sur mortgage* where facts are to be determined regarding fraud and lack of consideration for mortgage, and where after refusal for issue in Orphans' Court, petition for administrator's sale is pending, mortgagor having died, and Common Pleas action has been discontinued at suggestion of Orphans' Court.

Rule to show cause why order striking off discontinuance and reinstating action shall not be vacated. Common Pleas, Luzerne county. No. 690, May term, 1915.

FULLER, P. J., September 23, 1918.—The aspect of this case is peculiar.

Plaintiff had pending this action of *scire facias sur mortgage*.

The owner of the property, mortgagor, having died, plaintiff presented to the Orphans' Court a petition for order directing administrator's sale.

The Orphans' Court suggested a discontinuance of this action, on the theory that one remedy at a time was sufficient.

Plaintiff complied with the suggestion, and by authority of the Common Pleas entered a discontinuance, against objection by defendant.

The objection was animated by a desire to have a jury trial on certain allegations of fraud and lack of consideration in connection with the mortgage.

This desire was also urged by demand for an issue, in the Orphans' Court, where evidence was adduced in an attempt to substantiate the allegations.

The Orphans' Court disallowed the attack on the mortgage, and the demand for an issue.

Defendant then appealed to the Supreme Court, which quashed the appeal as interlocutory, strongly intimating, however, that plaintiff's proper remedy was by pursuit of the action in Common Pleas and not by petition in the Orphans' Court.

Plaintiff, alarmed by the intimation, returned to the Common Pleas with request, which was granted, to strike off the discontinuance and reinstate the action.

Defendant, keenly enjoying a situation in which by reason of the discontinuance he had been relieved from harassment in the Common Pleas, and by reason of the appellate intimation might entertain the happy anticipation of being later relieved from harassment in the Orphans' Court, is now naturally clamorous to continue the enjoyable state of discontinuance which he formerly opposed.

Plaintiff's first move was wrong and defendant's opposition thereto was right.

Plaintiff's last move is right, and defendant's opposition thereto is wrong.

It was a mistaken move to discontinue, and it was a wise move to reinstate, the *scire facias* in which the respective rights of the parties in relation to the mortgage can be most satisfactorily determined by judge and jury.

If we granted defendant's request, we would impose upon plaintiff the expense, delay and inconvenience of a new action without real benefit to defendant, which would be too foolish for words.

It is the proper business of Courts to discountenance all the tactics of procrastination, and bring lawsuits to the most expeditious conclusion that is possible, consistent with a careful regard for the rights of all concerned.

Hence we discharge the rule.

John McGahren, for plaintiff,
E. G. Butler, J. P. Lord, for defendant.

Court of Quarter Sessions of Luzerne County.

IN RE INCORPORATION OF MOCANAQUA BORO.

Incorporation—Unnecessary territory—Jurisdiction of Court.
Where petition for incorporation of borough includes territory unnecessarily large and unsettled, the Court, having no power to amend the lines, will refuse petition, even though incorporation within reasonable lines is obviously demanded in the interest of schools, etc. In such case the Court may suggest, with assistance of those qualified, lines within which such incorporation may be decreed.

Quarter Sessions, Luzerne county. No. 318, November Sessions, 1918.

STRAUSS, J., September 30, 1918.—The petition was filed on December 4, 1917, and prayed for the incorporation of territory having an area of about 3,500 acres, which includes the town or village of Mocanaqua and a mining hamlet known as Lee, about three miles distant from Mocanaqua. Mocanaqua in its built-up section, with all the houses that go to make up the village, does not cover more than 250 acres. It is now a part of Conyngham township.

The total assessment of the township for the year 1918 shows a valuation of \$876,107. Of this valuation that within the lines of the proposed borough so nearly as it can be ascertained is \$622,433, leaving \$253,674 of valuation for the entire township outside of the borough lines. The valuation inside of the proposed borough is made up of the following:

Mellville Coal Co. and West End Coal Co., coal, surface, buildings and machinery	\$492,848
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Occupations in Mocanaqua	\$ 46,635
In Lee	<u>5,775</u>
Total occupations	52,410
Real estate or taxables other than the two coal companies aforesaid	77,175
The taxable residents of the township are as follows:	
In and immediately about the village of Mocanaqua	450
In Lee	58
In the rest of the township	161
 Making a total of resident taxables	669
The occupations in the rest of the township are assessed at	\$ 20,525
While the real estate and other property assessed in the rest of the township amounts to	\$233,149

The foregoing figures are the result of a careful analysis of the assessment for 1918, but are, nevertheless, subject to an element of error believed by us to be small; and, therefore, we regard these figures as a close approximation rather than an exact statement of the facts.

The township, as now constituted, contains about twenty-five miles of public road, of which four miles lie within the territory proposed to be incorporated and twenty-one miles lie in the rest of the township.

It seems perfectly clear to us that Mocanaqua is a vigorous and growing town, compactly built, within an area of about two hundred and fifty acres. Outside of this there are comparatively few dwellings in the territory lying within one mile from the center of its population. There is great need for school (especially high school) accommodations in the town itself. The figures herein given show that it contributes by far the larger fraction of the school population of the whole township. The school management of the township has been such as to cause just complaint against it by the residents of the town; the high school for the township having been placed at Wapwallopen, accessible to the pupils living in Mocanaqua only by trains on the Pennsylvania railroad that run very inconveniently. Some of the residents of Mocanaqua have been sending their children across the river to the high school at Shickshinny, a fact that has given rise (as we know officially) to some litigation in the adjustment of the question of responsibility for the cost of tuition. There is, therefore, every reason for incorporating the village of Mocanaqua, and we would have no hesitation in making the decree if the area included in the petition might be considered as reasonably tributary to the village. The petition as presented includes land not only in Conyngham township, but also in Slocum and Newport.

Exceptions have been filed on behalf of Newport and on behalf

of the supervisors of Conyngham and these exceptions originally raised questions involving the constitutionality of that portion of the borough law authorizing this incorporation, the sufficiency of the advertisement under which the application was made and of the petition itself and the extent of territory that ought to be incorporated. Only those exceptions are now urged which relate to the extent of territory to be incorporated.

Outside of the settlement at Mocanaqua and the mining hamlet at Lee the territory included in the petition is uninhabited and mostly wild land. A great portion of it is underlaid with valuable coal deposits, whereby its valuation exceeds by far all the other assessable items of property in the township.

The burdens of government in the township results chiefly from two sources—the roads and the schools. In the establishment of this borough it seems to us that the Court ought to have in mind such an inclusion of territory in the new borough as will enable it to maintain its schools comfortably at such average rate of taxation as is common in similar boroughs and towns of this county, but that this should be done, if possible, without reducing the financial ability of the township to maintain its roads. To aid us in arriving at a basis that may be helpful hereafter, both to the petitioners and to this Court, we have asked the mining engineer employed by the board of county assessors to make a suggestion as to a line that would enable us to incorporate the borough, including within it the cemeteries and every other improvement or settlement that might be fairly considered as tributary or belonging to it and that would at the same time leave in the township reasonable capacity for the maintenance of its roads. He has drawn such line upon a map which we file with this opinion as a suggestion to the petitioners for the lines of the borough.

As we read the statute under which this proceeding has been instituted, we have no power to amend the petition by changing the lines as set forth in it, but must either incorporate or refuse to incorporate it as prayed for. If we were of the opinion that we have the right to depart from the line set out in the petition, we would have no hesitation in incorporating within these new lines. As it is, we are of the opinion that we would not be exercising a sound discretion if we included in the proposed incorporation of this town the large and unsettled territory unnecessarily included in the petition. The petitioners are not, however, bound to follow those lines, but may suggest some other limits to the borough that shall leave in the township an assessed valuation equal to at least one-half of the total assessment for 1918.

Now, September 30, 1918, the prayer of the petition for the incorporation within limits described in the petition, is refused and leave is granted to present a petition changing the lines of the proposed borough to meet the suggestions contained in the opinion this day filed.

Court of Common Pleas of Luzerne County.

IN RE APPEAL AUDIT SCHOOL DIS., HANOVER TWP.

Common schools—Townships—Audit—Surcharge—Notice—Jurisdiction.

1. Where auditors appointed under School Code to audit accounts of township school district filed their report in Common Pleas, Act 1911, then in force directing filing in the Quarter Sessions, the inadvertence does not avoid the jurisdiction of Common Pleas, and judges of that court have the power to direct the files to be transferred to the Quarter Sessions provided no right is invaded thereby.
2. Exception of surcharged directors that no statutory notice of surcharge was given by filing in the Quarter Sessions, unavailing where directors were present at audit, were examined, and knew that they were to be surcharged and therefore had actual if not statutory notice, and no claim is put forth that notice was not filed with the directors.

In the Court of Common Pleas of Luzerne county. No. 474, June term, 1912.

STRAUSS, J., August 14, 1918.—Auditors were appointed May 29, 1912, in accordance with Sec. 2619 of the School Code of 1911 to audit the accounts of Hanover township school district.

They filed their report December 23, 1912, and recommended several surcharges against officials of the district.

Appeals were taken by the surcharged officials and also by a taxpayer.

The appeal was disposed of by this Court through the action of one of the judges to whom the report and evidence taken by depositions had been submitted for adjudication in accordance with the Act of May 21, 1913, P. L. 288, and the Act of May 13, 1915, P. L. 311.

In pursuance of the latter statute a petition had been presented to the Court July 10, 1915, and an order made that "the several appeals set out in said petition shall be disposed of in a single proceeding." The appeals were tried and judgment was entered July 14, 1916, surcharging certain of the school directors \$11,347.45, and the treasurer \$49.14.

Because of the drastic consequences of his findings of fact and law and the legal questions as affected by the Appeal Maud S. Jones, 11 Jus. Law Rep. 266, the trial judge permitted exceptions to be filed so that the case might be re-argued before the judges of this Court *en banc*.

There is no statutory authority for this procedure, but we had undoubtedly power to order a re-argument; and exceptions were likely to be serviceable in defining alleged errors. Accordingly exceptions were filed on August 2, 1916, for the surcharged officials, and on August 5, 1916, for the appealing taxpayer.

I. JURISDICTION.

None of the exceptions imputed lack of power or jurisdiction in the Court to try the appeals on their merits, and not until actual argument of the exceptions before this Court *en banc* was any such question raised.

Then for the first time orally and in an accompanying brief it was contended:

"The Court of Common Pleas had no jurisdiction to receive and file the audit. Original jurisdiction under the Act of 1911, P. L. 865, was conferred exclusively on the Quarter Sessions."

This alleged lack of jurisdiction is claimed to have arisen from an error in filing the auditors' report in the prothonotary's office instead of in the Court of Quarter Sessions.

The School Code became a law May 18, 1911. It regulates practically every phase of school management which up to the time of its enactment had been covered by a multitude of statutes and introduced some new features into the public school system. It contained a special Article (XXVI), sub-divided into thirty sections, regulating the auditing of school finances; among them Section 2620 provided that the auditors in second and third class districts (Hanover township being in third class) shall file their report in the office of the prothonotary, and Section 2622 provided that any person interested may appeal from the auditors report within thirty days after the said report had been filed "as appeals are now taken from a county auditors' report," to-wit: to the Court of Common Pleas. (Act of April 15, 1834, P. L. 547, Sec. 56, 1 Purdon, 863.)

At the time of its enactment it was generally hoped that the School Code would remain in force as a legislative unity at least long enough to give its various provisions a fair trial; a hope that like many others based upon the probable action of the Legislature was at once broken; for when the Code was only twenty-one days old the Act of June 9, 1911, P. L. 865, was passed, whereby auditors' reports in boroughs, townships, poor and school districts were required to be filed in the office of the clerk of the Quarter Session through appeals were still to be taken to

the Common Pleas. This Act had so evidently included school districts inadvertently, that it was to that extent repealed at the next session of the Legislature by the Act of May 20, 1913, P. L. 254, whereby the respective section of the School Code again became effective.

The auditors from whose action this appeal was taken were evidently unaware of the later statute's existence, and therefore filed their report in the prothonotary's instead of the clerk's office. If the appellants had not been likewise ignorant they would certainly have raised this question of jurisdiction at an earlier stage; they well knew that the report was on file in the prothonotary's office to the same number and term as their own appeal; and they used the report together with the other files in this case at the trial.

It is now argued with great earnestness that the filing of the report in the prothonotary's office avoids the jurisdiction of the Common Pleas in the trial of these issues. We cannot sustain that contention. The appeal was not taken from the auditors' act of filing the report but from the auditors' act in upholding charges of misfeasance brought against the directors. The purpose of the statutory requirement for filing the report in a definite office is to direct persons interested to the information necessary for taking the appeal.

Under the Act of April 15, 1834, Sec. 103, P. L. 555, the report of township auditors was required to be filed "with the town clerk, if there be one, and if there be no town clerk it shall remain with the senior auditor for the inspection of all persons concerned." Under the School Code one copy was to be filed with the board of school directors, and another copy with the prothonotary, and by the later Act of 1911 with the clerk of the courts. The copy filed with the directors was just as potent in giving notice to the directors that it contained findings of fact adverse to their interests and impugning their integrity as the copy that ought to have been filed in the clerk's office. Immediately upon getting this information their right to appeal was complete. Filing in the wrong office at the court house would simply postpone the period during which the right of appeal must be exercised. It follows that any person interested in the report now before us who has not yet taken an appeal will be protected in his right to an appeal for a period of thirty days after the report shall have been filed in the office of the clerk of the Court of Quarter Sessions.

The judges of this court are commissioned only as judges of the Court of Common Pleas. Incidentally, under the Constitution, Art. V, Sec. 9, they shall be judges of the Courts of Oyer and Terminer, Quarter Sessions of the peace and general jail delivery. Therefore they have the fullest power to direct a paper

accidentally or inadvertently filed in the Common Pleas instead of the Quarter Sessions to be withdrawn from the files of the one and placed on the file in the other, provided that no right of any individual shall thereby be affected. The only right that might be affected by the misfiling in this case is the right of one who has not yet appealed. Where that right has been exercised no harm results from the transfer of the paper. To hold otherwise would be to invent a senseless technicality with no consequences other than the delay of justice.

The jurisdictional facts in this case are: 1. The judgment of the auditors duly arrived at and incorporated in their report; 2. The act of the appellant in bringing the case into court by an appeal.

The appellant school directors had in accordance with the statute direct notice of the results of the audit, and this was sufficient to authorize and sustain the appeal. We therefore dismiss this objection but shall direct that the report of auditors be withdrawn from the files of the Common Pleas and that it shall be filed in the Court of Quarter Sessions.

II. EFFECT OF LACK OF NOTICE OF SURCHARGE.

The exceptions also fail to refer to disposition made by the trial judge of a protest against the surcharge because of lack of notice, but nevertheless it has been included in the argument and brief.

Each of the directors took an appeal from the audit, having incorporated in it a protest that the appellant "excepts to the audit and surcharge for the reason that no notice was given to the appellant by the auditors as required by Sec. 2614 of the Act of May 18, 1911, P. L. 309."

For this reason it is argued "the audit is irregular and void."

Section 2614 of the School Code, P. L. 427, upon which this argument is based, reads as follows:

"In all school districts of the second, third and fourth class when any sum is charged against any person, such person shall be notified by the auditor at or before the day of filing their report by mail or otherwise of such fact setting forth the amount charged against him."

There is in this auditors' report inherent evidence that the school directors were present at the audit, were questioned concerning the matters involved in these surcharges, and that they had full actual, though not statutory written notice that they were to be surcharged. In addition to this there is no claim that the report of audit was not filed with the school directors as required by the statute. As it has not up to this time been filed in the office of the Quarter Sessions, actual, though not special, notice of the proposed surcharge is clearly made out.

There is no analogy between this notice and the notice required

to be given to a justice of the peace that suit will be brought against him for official misfeasance.

The Act of March 21, 1772, authorizing actions against justices of the peace did not leave it to construction to declare why a notice to the justice in advance of suit shall be served, but it was set out in clear terms that:

"Whereas justices of the peace may be discouraged in the execution of their office by vexatious actions brought against them, or by reason of small and involuntary errors in their proceedings; and whereas, it is necessary that they should be (as far as is consistent with justice and safety and liberty of the subjects over whom their authority extends) rendered safe in the execution of the said office and trust. * * * Be it enacted that no writ shall be sued out against * * * or served on any justice of the peace for anything done in the execution of his office until notice in writing of such intended writ or process shall have been delivered to him, etc."

The very purpose of the audit is to ascertain whether officials have performed their duties according to law. This is known to the official. The requirement as to notice setting out the amount charged against the person affected by the audit can have no other purpose than to enable that person to demand a full hearing before the auditors to whom he has the right to present witnessess and other evidence and thus to defend against the imputations that might otherwise be cast upon him by the proposed action of the auditors. But the surcharged school directors were not bound to insist upon this notice. They might waive it, as indeed they did, when, with a natural impulse to defend themselves against what they regard to be injustice, they appealed promptly to this Court to re-try the issues involved in the surcharges and proceeded with the trial, submitting voluntarily the evidence to the Court and obtained the Court's judgment.

Had they really desired a fuller hearing before the auditors they might have made an application to the Court for a special order upon the auditors at the time when they filed their protest, or they might of their own accord, when they found the report was against them, have gone before the auditors; or they might have awaited the filing of the audit in the Quarter Sessions and thereupon made application to have it referred back to the auditors on the ground that it contained surcharges of which no notice had been given to the persons affected. The failure to give such notice, however, did not nullify and render void the action of the auditors.

III. THE SEVERAL ITEMS OF SURCHARGE.

An examination of the evidence and a full consideration of the briefs in support of and against the exceptions have led us to sustain the findings of fact and law as reported by the trial judge.

So far as surcharges No. 1 (for the library), Nos. 4, 5 and 6 (for moneys expended for contracts amounting to an aggregate of \$9,690.84) the statutory safeguards requiring advertisement inviting competitive bids were entirely disregarded by the school board, while as to the library the board took no action whatever authorizing its purchase and therefore the minutes show no "aye" and "nay" vote on the subject. Hundreds of books were bought by a book agent whom the directors individually and unofficially entrusted with the unlimited right of selection as to titles and quantity and of purchase for account of the district. Not until the bill was presented for payment, after the books were supposed to have been delivered, was any action taken and then only such as was involved in the drawing of an order on the treasurer for payment at prices far in excess of the ordinary retail prices at which the books might have been purchased singly in any book store.

As to items 4, 5 and 6 no bidding was invited. The money paid out far exceeded the amount nominally fixed by the contract —in No. 6 the extras being almost double the original contract.

As to the second and third items of surcharge, some of the judges are of the opinion that the amount as fixed by the auditor should have been adhered to, because they disallowed entirely the expenses incurred for traveling and hotel bills while investigating manual training schools, and they also refused credit for orders drawn in favor of a member of the school board to cover the costs of a school picnic.

As the trial judge reduced the second surcharge from \$600 to \$110.60 and eliminated altogether the third, amounting to \$296.50, the report as made by him and now confirmed is as favorable to the exceptants as it is possible to make it.

Now, August 13, 1918, it is ordered that the report of auditors filed with the prothonotary be withdrawn from the files of the prothonotary's office and be filed with the clerk of the courts; and it is further ordered that judgment be entered against William H. Morris, William B. Delaney, Thomas Lavin, John A. Riley, Patrick J. Lenahan and Henry W. Brown in the sum of \$1,656.61 surcharge for library expenditure; \$2,990 surcharge for payment to Harry Connor; \$5,400.84 surcharge for payment to Ed. Donohue, and \$1,300 surcharge for payment to Stanley or Constant Rovinski, and \$110.60 surcharge for account of expenses incurred in connection with manual training investigation, making a total judgment against them of \$11,458.05; it is further ordered that the amount found owing by the treasurer to the school district as the result of the audit be and hereby is fixed at \$12,837.37, and judgment is directed accordingly.

J. D. Farnham, for exceptants.

P. W. McKeown, F. A. McGuigan, B. R. Jones, for school directors.

FURMANSKI *et al.* v. IWANOWSKI *et al.**Churches—Suspension of priest by bishop—Canon law.*

1. When after complaint of Roman Catholic congregation as to the public conduct of priest, the bishop of the diocese directs priest to call a meeting to ascertain wishes of the congregation as to retention or removal, and priest refuses to call such meeting, bishop is justified under the canon law in sentencing priest to suspension *ab homine*, which is equivalent to removal, and injunction will lie to prevent priest from exercising his ecclesiastical functions as to that congregation, and from holding possession of the church property.
2. In case above complaint of nullity by defendant priest and a group of trustees, intended to act as supersedeas, had been refused by higher church authorities.
3. Distinction between suspension of priest *a jure* and suspension *ab homine*.

Injunction bill. Common Pleas Luzerne county. Sitting in Equity. No. 12, May term, 1915.

WOODWARD, J., February 18, 1918.—On April 27, 1915, plaintiffs filed their bill in this case, which, with the amendments allowed, sets forth that they are residents of Nanticoke, this county, and members of the Holy Trinity Roman Catholic Polish Church under the jurisdiction and supervision of the Right Rev. M. J. Hoban, Bishop of the Scranton diocese.

That the Rev. B. Iwanowski, one of the defendants, was ordained by the bishop of the Scranton diocese, and appointed as priest in the said church, of which he has been the pastor continuously for the past eight years. That the other defendants claim to be the trustees of said church. That on January 14, 1915, the bishop suspended Rev. Iwanowski. That notwithstanding such suspension the Rev. Iwanowski continues to act as priest and the other defendants aid and abet him in ignoring the suspension.

They pray the Court for an injunction to restrain the Rev. Iwanowski from exercising the functions of the office of priest of said church and from using the church property, and restraining the other defendants from obstructing or interfering with any other priest appointed by the bishop to take the place of the Rev. Iwanowski in said church.

On the same day, April 27, 1915, a preliminary injunction was granted as prayed for. The hearing to continue was fixed for May 1 and continued from time to time.

On May 28, 1915, defendants filed their answer, admitting

some of the allegations of the bill, denying others, and requiring proof of others, and on July 2, 1915, filed an amendment or supplement to their answer stating that on June 25, 1915, a complaint of nullity had been filed by them with the Most Reverend John Bonzano, apostolic delegate to the United States, the supreme ecclesiastical authority of the Roman Catholic Church in the United States, which, under the canonical laws of the church, has a suspensive effect of all invalid sentences imposed by inferior tribunals of the church.

The replication filed by the plaintiffs put at issue two main questions: First, was the suspension valid? Second, did the complaint of nullity act as a supersedeas?

July 1, 1915, acting on the evidence then before us, we decided that, under the canon law, the suspension of a priest without a hearing or trial was void, and that the complaint of nullity superseded the judgment of the bishop, and, therefore, we dissolved the preliminary injunction.

Since then the complaint of nullity has been decided against the Rev. Iwanowski by the higher tribunals of the church to which he appealed, so that the suspension of the judgment of the bishop is avoided, if there was any, and the only question before us is whether the bishop had a right to suspend the priest.

When we decided this question in the negative on the dissolution of the preliminary injunction, we thought we were following the civil law and the canon law as laid down by our Supreme Court in *Stack v. O'Hara*, 98 Pa. 213, in which Judge Trunkey says: "Removal is the exercise of episcopal authority according to the bishop's judgment. It may be without supposition of wrong and it leaves the priest in the same position as all other priests who are without employment. Suspension is a judicial act based on something which calls for such sentence. A sentence of suspension follows a trial for an offense from which the priest may appeal, but for a removal the priest may have recourse to the bishop's superior. To confound removal with suspension, acts so different in character, is to lay the groundwork for the mis-application of certain laws of the church and also for the false conclusion that the bishop has no power of removal for grave cause unless there first be a trial for some ecclesiastical offense."

The confusion that has arisen in the case at bar has been

caused by calling what was really a "removal" as defined by Judge Trunkey, a "suspension", and failing to distinguish between a "suspension *a jure*" and a "suspension *ab homine*", which latter is in substance a "removal".

Let us go back to the original cause of the suspension of the priest by the bishop. Complaints of the priest by the congregation had come to the bishop, who summoned the priest for a conference on January 14, 1915. As a result of that conference the bishop told the priest to call a meeting of the congregation the following Sunday, January 17, 1915, to get an expression of opinion, so that if the majority of the congregation favored the priest he might retain him, or if not, he might remove him. The priest demurred but did not refuse. The bishop warned him if he refused he would suspend him. The next day the priest called the bishop on the telephone and told him "he would not call the meeting" as the bishop says, or that "he guessed he would not call the meeting," as the priest says. The priest subsequently qualifies his statement by saying that he did not refuse but sought to be excused from calling the meeting on account of ill-health and an accumulation of other duties on the 17th. We find that whatever the words used over the telephone were, the impression conveyed and sought to be conveyed to the bishop was a refusal to call the meeting as ordered, and thereupon the bishop suspended the priest for insubordination. That this was the fact is borne out by the subsequent action of the bishop, who procured a preliminary injunction (not the one in this case) on January 16, the day before the meeting was to have been called, restraining defendant from further action as priest. This was followed by a written suspension sent by registered letter which the priest refused to accept and open, although knowing it came from the bishop, which was another act of insubordination for which he might well have been punished. Although there is confusion in the testimony as to what was said and done and when it was said and done, it is clear from the documentary evidence that the offense was the refusal to call, rather than the failure to call, the meeting. It could not have been the failure to call the meeting, because that the bishop rendered impossible by the injunction.

We find that an order was given by the bishop to the priest.

That the order was reasonable and within the scope of the bishop's authority.

That the priest was bound to obey.

That he refused to obey.

That the bishop suspended him for his refusal.

It makes no difference that the bishop testifies that he suspended him for his failure to call the meeting. The failure was due to the injunction which was due to the refusal, so that we get back to the refusal as the primary cause. Nor does it make any difference when the formal suspension actually took place, whether in the conversation over the phone or the following week. The refusal was disobedience. Disobedience is cause for suspension *ab homine*. Suspension followed, and this brings us to the difference between "suspension *ab homine*" and "suspension *a jure*." The latter is where charges are brought against a priest for misconduct. He cannot be found guilty of misconduct without a hearing or trial. This is a judicial proceeding from which the canon law provides an appeal on the part of the accused from the judgment of the lower Court to the higher appellate courts prescribed. But a "suspension *ab homine*" is for direct disobedience or insubordination committed in the presence or hearing of the bishop, as in this case. Why have a hearing or trial? The matter was directly between the bishop and the priest. They alone knew of it. What was there to be heard or tried that required any testimony or witnesses. It is like contempt of Court. A contempt in the presence of the Court may be punished summarily. The Court has heard it or seen it, and no hearing or trial is necessary. But a contempt not in the presence of the Court must be established by a hearing or a trial before punishment can be inflicted.

The suspension Judge Trunkey had in mind when he wrote the opinion in *Stack v. O'Hara* was a "suspension *a jure*." The suspension in this case was "*ab homine*" and is equivalent to a removal, which may be at the pleasure of the bishop without trial. It leaves the priest in the same position as all other priests who are without employment. It deprives him of no right of property in his office as priest.

Both sides have submitted requests for findings of fact and law, which with the answers of the Court thereto are as follows:

LAW.

"First. That the injunction heretofore granted be continued until further order of the Court."

The injunction should now be granted.

"Second. That the Rev. B. Iwanowski be enjoined and restrained from holding any services or performing or exercising any of the functions of the office of parish priest of and for the Holy Trinity Roman Catholic Polish Church and Congregation of Nanticoke."

Affirmed.

"Third. That all of said defendants be enjoined and restrained from obstructing or interfering with any regularly ordained priest of the Roman Catholic Church selected and appointed according to the rules and regulations, usages, canons, discipline and requirements of the Roman Catholic Church, namely, by the Right Rev. Bishop of the Scranton diocese, to take charge of, perform and exercise the duties and functions of parish priest of the Holy Trinity Roman Catholic Polish Church and Congregation of Nanticoke, Pa."

Affirmed.

"Fourth. That the decision of the Right Rev. Bishop of the Roman Catholic Church in the Scranton diocese suspending the Rev. B. Iwanowski as the pastor of the said Holy Trinity Roman Catholic Polish Church and Congregation of Nanticoke, Pa., is of binding force and effect upon the said defendants as members of said church until the same is reversed, annulled or set aside in a regular and orderly way by appeal to his ecclesiastical superior or appellate tribunal having jurisdiction as established and recognized by the laws of said church."

Affirmed as a suspension *ab homine* from which no appeal lies.

Defendants' requests for findings of

LAW.

"1. That under the law of Pennsylvania, the suspension of a Roman Catholic priest cannot take place until there has been canonical notice and trial."

Refused.

"2. That the suspension of Rev. B. Iwanowski was without legal right."

Refused.

"3. That the plaintiffs are not legally entitled to the relief prayed for in their bill and that the proceedings should be dismissed with costs to the defendants."

Refused.

John McGahren, F. P. Slattery, for plaintiffs.
J. H. Dando, T. D. Shea, for respondents.

STANDARD VARNISH WORKS *v.* MURDOCK.

Referee—Filing report—Death of defendant—Notice.

Where referee finds for defendant, has prepared report and given notice of intention to file, but death of defendant intervenes before filing, plaintiff's contention that death of defendant avoids the reference is not sustainable, particularly where due suggestion of death and substitution of executrix had been made.

Exceptions to report of referee. Common Pleas, Luzerne county.
No. 303, November term, 1915.

FULLER, P. J., October 23, 1918.—After this case had been fully tried and the referee had prepared his report in favor of the defendant, and after notice by the referee of his intention to file the report on June 3, 1918, but before actual filing thereof on that day, the defendant died.

The only exception filed by the plaintiff to the report is, that by the defendant's death prior to the filing of the report, the entire reference was *ipso facto* revoked.

We cannot sustain this contention.

If the decision of the referee had been against the defendant, there might be cause for complaint by the executrix, who did not receive notice, but being in his favor we fail to see how the plaintiff, who did receive notice, can possibly urge any objection on this score.

Or, if judgment had been entered on the report before suggestion of death and substitution of executrix, there might be a technical infirmity in the proceeding.

But due suggestion and substitution were made on June 23, and judgment will not be entered until our decision is handed down.

In a reference of this character, widely distinguished from an arbitration, the referee stands in precisely the position of a Court, subject to review, and plaintiff's present contention is no more plausible than would be a contention that after trial and verdict in the Court of Common Pleas, the death of a party before judgment, up-roots the entire proceeding.

The exception is, therefore, dismissed, the report is confirmed, and the prothonotary is now directed to enter judgment in favor of the defendant.

David Rosenthal, for plaintiff.
F. M. Nichols, for defendant.

TIGUE *v.* FORTY FORT COAL CO.

Workmen's Compensation Act—Employe killed by engine of another company operating on leased right of way.

Where a workman is killed by engine operating under leased right of way inside enclosure of coal mining company, and compensation board reverses referee's finding for damages, on ground that coal mining company was not responsible, facts showing that accident occurred on usual route used by workmen in entering and leaving the premises:

Held—Workmen's Compensation Act protects workmen from time they enter till they leave premises of employer, and entry of another operating under leased right of way does not absolve employer from responsibility on the premises.

Compensation board may approve or reverse referee on question of law. Where fact rules, the board may approve or on reversal should grant hearing *de novo*.

Common Pleas, Luzerne county. No. 810, May term, 1917.

O'BOYLE, J., Sept. 19, 1918.—This case as it comes before us on appeal from the judgment of the compensation board, wherein it reversed the referee, discloses that the claimant's husband was employed as a miner in the four-foot tunnel, at Forty Fort colliery, operated by the defendant company; that he was killed on his return home from work on December 18, 1916, by an engine of the Lehigh Valley railroad, while within the enclosure of the premises of the defendant company, and while pursuing the usual course—according to the referee's findings of fact—taken by him in going to and returning from his place of employment, and that this customary route was along or over the railroad tracks on which he met his death, a distance of about one hundred and fifty feet inside the board fence enclosing the premises of the defendant company.

It appears from the testimony taken before the referee, that the course which the deceased took on the evening in question, was used by a number of employes, whose homes were in the same direction as that in which the deceased lived, in going to and from their work, and that they had passed in and out, through a gateway of this enclosure, for a long period of time.

It also appears that the engine of the Lehigh Valley railroad which killed the deceased, passed through this same gateway in going to and from the breaker of the defendant company for the purpose of bringing cars to and removing coal from the breaker.

This was done under a lease, which was offered in evidence before the referee. By its terms the defendant company granted

to the Lehigh Valley railroad, in 1902, the right to lay a track and operate a railroad over this property in order to carry on the railroad's business for its own benefit. It was on this track that the claimant's husband met his death.

It is therefore contended by the claimant that the premises were in the occupancy of the defendant company, subject only to a right of way, and that the defendant had the right to establish and permit the use of a customary way across, along, or over the railroad track, provided that by so doing it would not infringe upon the railroad company's uninterrupted use of the track, or its rights under the lease.

It was also contended by the claimant, both before the referee and the compensation board, that the deceased met his death in the course of his employment while returning home by the most direct route from his work, and that he was pursuing the usual and customary course taken by him and others after leaving their place of employment to reach their homes.

Under these facts the question now presented to us is, whether or not the claimant has lost her right to the protection of the Compensation Act of 1915?

As a general proposition, the rule is that an employe who has finished his work is entitled to the protection of the Compensation Act until he has completely left the place or has had sufficient time to leave it and come upon a public highway or upon a place entirely disassociated from the plant or place of his employment. With this thought in mind, we find no proof in the case to show that the deceased had in any way disassociated himself from his employer's premises, or that he had done anything that would in any way deprive him of the right which an employe has, of being under the protection of the Compensation Act from the time he reaches the premises of his employer, in the ordinary way, to the time when he leaves them.

It is conceded that the defendant company erected this enclosure around its premises; and, the referee having found from the evidence of three witnesses that the deceased was pursuing the customary way for those living in that direction, of entering and leaving the premises, it seems to us that before he could be reversed it was necessary for the compensation board to grant a hearing *de novo*, in order to find a contrary fact for themselves, and to give, if it were possible, at the hearing *de novo*, an oppor-

tunity to the claimant to support with other witnesses her contention that this was the customary way for these employes to go to and return from their work, and that this defendant company had permitted its use for a long period of time.

The main contention of the defendant company to avoid liability is based upon the theory that the defendant company is not liable because of the lease hereinbefore referred to, and that notwithstanding the claimant's husband was within the enclosure and upon the premises, he was not in the course of his employment, nor was his death due to the condition of the defendant's premises, and that hence there can be no recovery.

The business of the defendant company was to produce and ship coal to the market, and it used this railroad track as the instrumentality in the direct line of its business to carry on its operations.

The compensation board, on appeal, reversed the referee on the law, notwithstanding his findings of fact, holding that Tigue, at the time of the accident, was doing nothing in the course of his employment, and was not injured as a result of the condition of the defendant's premises.

We are unable to agree with these conclusions. It is our judgment that Tigue was doing something in the course of his employment from the moment he entered the enclosure on his way to work until he left the premises and got outside of the enclosure on his way home, and that his death was due to the condition of the premises of the defendant company.

In the case of *Hotaling v. Standard Oil Co.*, reported in 6 N. Y. State Dept. Rep., page 308, it was said: "The general rule undoubtedly is that an employe who has finished his work is under the Compensation Act until he has completely left the plant, or, at least, has had sufficient time to leave it and come upon a public highway or upon a place entirely disassociated from the plant. When he has so left the plant, unless he is still upon some errand or duty for his employer he is no longer covered by the Act."

As we understand the law, the employe is protected by the Compensation Act anywhere within the defendant's enclosure while he is going to his work, while he is actually performing his work, and while he is returning from his work; and this is so whether he is injured with or without his own negligence.

It might be said with truth that it was negligence on his part to have walked upon the tracks. But the defendant company could have prevented that, when they must have known of its use, if they had regarded it dangerous, by fencing it off, or by some other means preventing the use of this way to its employes, instead of shielding themselves behind the existence of a lease with a third party by contending that a third party operated the railroad over which they permitted their employes to travel, and hence, that no liability attaches to that condition.

It was said by his Honor, Judge Moschzisker, in the case of *McCauley v. Imperial Woolen Co.*, defendant, appellant, and *London Guarantee & Accident Co.*, No. 336, January term, 1917, Philadelphia County, not yet reported, that: "The statute contemplates and requires that if after inspection and consideration of the adjudication and evidence, the board does not sustain the referee's final decision, before the former may reverse on a question of fact it must grant a hearing *de novo*, make investigation, and substitute its own findings of fact and conclusions thereon, for such findings of the referee as are not adopted; but when an appeal is based only on alleged error of law the board must act solely upon the record of the referee, and thereon it may either sustain, reverse or modify the latter's final order."

In the same opinion, the same jurist, commending what was said by President Judge Shafer, of the Common Pleas of Allegheny county, in *Yalch v. Jones & Laughlin Steel Co.*, 66 P. L. J., 636-637, that the Act of 1915 was correctly construed by Judge Shafer, wherein he states that: "Appeals to the board are taken under two sections of the Act—420 and 421; the first amounts to a writ of error and the second to a motion for a new trial; the new trial to be had before the board instead of the referee. The first of them is to redress errors of law committed by the referee, and the second to review his findings of fact when it is claimed they are not warranted by the evidence."

We have gone over this case with appreciation of the fact that we can find no case which is exactly similar to it in all its facts; but we are unwilling to approve the restrictions of the Compensation Act adopted by the learned compensation board, and, for the reasons which we have stated, the judgment of the workmen's compensation board is hereby reversed, and judgment is directed to be entered in favor of the plaintiff according to the recommendation of the referee, that compensation be awarded the claimant, Mrs. Bridget Tigue, widow of William T. Tigue, at the rate of 40 per cent. of \$12.03, or \$4.81 per week, for 300 weeks, from December 18, 1916, to September 17, 1922, amounting to \$1,443; for reasonable expenses of burial, \$100; total, \$1,543.

R. J. Devers, for claimant.
J. R. Wilson, for defendant.

MANNO *v.* O'BRIEN *et al.*

Negligence—Damages—Co-employe—Act 1907, P. L. 523—New trial.

1. Where plaintiff, a laborer employed in road making, is asked to undertake work unfamiliar to him, is placed by superintendent under the direction of truck driver, fellow employe, in riding with latter in one truck to meet another truck, is directed by driver to leave the truck and ride on the other, and driver starts truck too quickly so that plaintiff is caught and run over, the circumstances bring the case under Act 1907, P. L. 523, and new trial after verdict for plaintiff will be refused.
2. Comparison of cases involving negligence of co-employe.

Trespass. Motion for judgment n. o. v. Common Pleas Luzerne county. No. 758, June term, 1916.

GARMAN, J., January 15, 1919.—In August, 1915, Angelo Manno, the plaintiff, was a laborer employed by defendants in the construction of a road near Butler, Pa. The manager or superintendent in charge of the work for defendants was a man named Rocks. The gravel used in the work was hauled in motor trucks from a station in Butler. On the evening of August 16, Mr. Rocks asked Giuseppe Manno, a brother of Angelo, to work, but Giuseppe refused. Then Rocks turned to Angelo and said: "You want to work to-night?" and Angelo answered: "No, I cannot work; I don't know what to do." The superintendent then said: "Gene will show you what to do."

The work which plaintiff was asked to do was to get on an empty truck driven by Eugene O'Brien and go with that truck until a loaded truck was met, when plaintiff was to get off the empty and accompany the loaded truck to the place where the load was to be deposited. Plaintiff had never done this work before. Eugene O'Brien had instructions from Rocks to stop and allow plaintiff to get on the loaded truck.

On the said evening plaintiff went to work on the truck and proceeded with it until a loaded truck was met, when O'Brien stopped the empty truck and told plaintiff to get off. Plaintiff undertook to do so, when O'Brien started the truck, causing plaintiff to fall to the ground under the truck in such a manner that it ran over him and caused the injuries for which plaintiff brought suit against defendants.

The verdict of the jury established the facts as testified to by plaintiff and his witnesses.

The defendants, however, move for judgment *non obstante veredicto* because of the refusal of the trial judge to affirm their points, which points were as follows:

- "1. Under the evidence in this case Eugene O'Brien was not

performing any act of superintendence or foremanship at the time of the accident.

"2. The negligent act complained of, to-wit, the starting of the truck, was not an act of superintendence or foremanship, but was the act of a fellow servant for which the defendants are not liable.

"3. Under all the evidence Eugene O'Brien was a fellow servant of the plaintiff at the time of the accident and the verdict should be for the defendant.

"9. Under all the evidence the verdict must be for the defendant."

The defendants base their contention on the legal principle, "Where co-employees are co-operating in the accomplishment of a common object, a principal is not liable in damages where the negligence of one results in injury to the other." They argue that Manno and O'Brien were "co-operating with one object in view, to-wit, the transfer of the road materials from the station at Butler to the scene of the work several miles distant from Butler; that in thus co-operating, O'Brien driving the empty truck, had one main object in view, to-wit, secure the materials at Butler, return to the scene of the work and there deposit his truck load at a point to be designated by Manno; that Manno rode in toward the town on the empty truck for the purpose of dismounting and boarding the loaded truck when he would meet it and then accompany the loaded truck to the scene of the work and there point where the materials should be deposited."

Defendants cite in defense of their position these cases: *Feeney v. Abelson*, 49 Superior, 163; *Miller v. Bridge Co.*, 216 Penna. 24; *Reiser v. Electric Co.*, 246 Penna. 24; *Remmert v. Penna. R. R.*, 18 D. R. 372.

1. *Feeney v. Abelson*.—The plaintiff was employed in and about defendant's junk yard. He received his injuries from the premature starting of a team driven by defendant's brother while both were in the act of moving a steel beam from one part of the yard to another. There was evidence that when defendant was absent at times the said brother was the boss, but at the time of the accident of the injury the defendant himself was on the premises.

This fact of itself destroyed plaintiff's case; but the appellate court in so deciding went farther and said: "If it were otherwise and the evidence justified the conclusion that the driver was the "boss" at the yard, the work in which the parties were engaged did not involve the application of the principle involved by the plaintiff, to-wit, that defendant was liable for the negligent act of his foreman."—but this ruling was based on the facts of the case.

2. *Miller v. Bridge Company*.—Plaintiff was a carpenter employed by defendant. His immediate superior, Ward, had charge

of the work on the ground, had power to hire and discharge the men employed upon the work and to give directions to the men employed on the work. On the day of plaintiff's injury he was working on a bridge and was directed by Ward to go down to the top of a stone pier and receive and put in place timbers which would be lowered to him through an opening in the floor of the bridge. While so doing plaintiff was injured because a rope tied around the timber by Ward became unloosed, fell, struck plaintiff and knocked him into the river. The jury found Ward to be negligent. The rule for judgment *non obstante veredicto* was made absolute on the theory that "when Ward assumed to tie the rope around the piece of timber he was not representing his employer as a vice principal but as an ordinary laborer, and as such he was a fellow-workman of the plaintiff, Miller."

3. *Reiser v. Electric Company*.—The plaintiff, one of several employes, was engaged in the erection of poles, one of which fell upon plaintiff and injured him. The pole was about fifty feet long and twenty inches in diameter at the butt. During the process of raising the pole it was the duty of one of the men to assist in holding the pole in position with cant hooks fastened to the pole near the butt. When the pole fell the foreman of the gang was operating the cant hooks, but the evidence shows that he did not usually attend to this duty. The jury found that plaintiff was injured through the foreman's negligence and rendered their verdict against the defendant employer of the foreman.

The Supreme Court reversed the judgment entered against the defendant on the verdict on the theory that in holding the cant hook at that particular time the foreman was simply co-operating with the rest of the men and stood upon precisely the same footing.

4. *Remmert v. Penna. R. R. Company*.—George W. Remmert, an engineer, operating the locomotive attached to a passenger train was killed in a collision with a tender and locomotive at a cross-over from a siding to the west bound track of defendant's railroad. The passenger train had the right of way and the engineer of the tender and locomotive should have stopped on the siding until the passenger train went by; but he forgot that the train was due and a collision occurred, causing Remmert's death. This case raised the question of "the liability of the defendant for the death of an engineer of a railway train, caused by the negligence of another engineer in charge of a locomotive, in disobedience to orders." The decision of the learned judge was that the second section of the Act of June 10, 1907, P. L. 523, did not apply to the case; and under the facts of the case the conclusion of the Court was clearly right.

In each of the cases cited, the plaintiff was engaged in and about his regular work with its ordinary risks, but in the case

under consideration the situation was entirely different. Here the plaintiff was put to work at a branch of employment new to him; he was ordered to take passage on the empty truck until the loaded one was met; he protested that he didn't know what to do; he was placed under the direction of O'Brien; he was directed by O'Brien to alight from the truck and plaintiff had no duty to perform on the empty truck except such as pertains to a passenger.

Suppose that instead of taking plaintiff as a passenger on the empty truck one of the defendants had taken him in a motor car and that in alighting he had been injured through the driver's negligence, would there then be any question of defendant's liability? The circumstances in the case are practically the same as in the foregoing supposition, with the exception that O'Brien was going with the truck to procure a load. However, to the point of meeting a loaded truck, O'Brien was simply driving a motor vehicle to convey plaintiff to that place, there to stop and see that plaintiff got off the vehicle; and O'Brien was doing this and plaintiff was riding, in pursuance of the orders of the superintendent of the work. This case would seem to resolve itself to a proposition something like this: Plaintiff agrees to work, if defendants would direct him what to do; defendants agree to convey plaintiff to the place of work and then tell him what to do. Surely the implication of the agreement would be safely to convey plaintiff and to give him an opportunity safely to get down from the conveyance. If such be the implication, defendants would be liable in damages when plaintiff was injured through the driver's negligence.

The superintendent, Rocks, was the agent of the defendants; he was actually engaged in their work, although he was absent on the night of the accident; and he placed Eugene O'Brien in charge of the plaintiff with orders to direct plaintiff where and when to dismount from the truck—which was the particular work in which the employe was then engaged. This state of facts brings the case under the Act of 1907, P. L. 523, which provides "that in all actions brought to recover from an employer for injury, suffered by his employe, the negligence of a fellow-servant of the employe shall not be a defense where the injury was caused or contributed to by * * * the negligence of any person in charge of or directing the particular work in which the employe was engaged at the time of the injury; the negligence of any person to whose orders the employe was bound to conform, and did conform, and by reason of his having conformed thereto, the injury or death resulted."

The proof in this case brings it fully within those provisions. The motion for judgment *non obstante veredicto* is denied.

J. L. Morris, for plaintiff.

F. A. McGuigan, for defendants.

Orphans' Court of Columbia County.

SHARPLESS ESTATE.

Decedents' estates—Appointment administrators—Revocation—Act 1917, P. L. 447—Mandatory provisions—Residence administrators.

1. Where letters of administration have been granted to niece and nephew, there being no children, and without information to register of other nieces and nephews, register may revoke said letters in the interest of all concerned, and to correct an honorable misunderstanding.
2. Sec. 2, clause D, Act 1917, P. L. 447, is mandatory and every application for letters should be by petition, setting forth, *inter alia*, names and residences of all the next of kin.
3. In case, *supra*, no intention imputed to those receiving letters of withholding information as to other relatives of like degree. Interests of estate as to location of administrators, preferences of all heirs, etc., reinforced desirability of revocation and reappointment.
4. Where same conclusion is reached in petition to revoke as would have been reached in appeal, it matters not whether register acted first in revocation of letters or not.

Appeal from decision of register revoking letters of administration. Orphans' Court, Columbia county. No. 11, February term, 1918.

HARMAN, P. J., November , 1918.—Catharine Sharpless died intestate January 19, 1918, leaving as her only heirs at law and next of kin a number of nephews and nieces of the whole blood and a number of grand nephews and nieces. January 22 letters of administration were granted by the register of Columbia county to W. H. Pfahler, nephew, and Sarah Metzger, a niece. Both are of full age. January 29, 1918, Fred Seesholtz, a nephew of the decedent, presented his petition to the register praying that the letters issued in the estate be revoked and set aside and that letters issue to him setting forth as reasons, therefor, *inter alia*:

- a. "That at the time of making application for said letters Sarah S. Metzger and William Pfahler gave the register of wills the impression that they were the only heirs and next of kin of the decedent, and failed to file at the time of making such application a petition duly verified by affidavit setting forth the residence, citizenship, and the place, day and hour, of the death of the decedent, or estimated value of her property, real and personal, the location of her real property, the names and residences of the heirs and next of kin of the intestate or an averment that such persons named were all the next of kin of said intestate as is required by Section 2, clause (d) of the Act of June 7, 1917, P. L.
- b. "That your petitioner is advised and believes that under clause C, section 2, of the Act of June 7, 1917, he is entitled to letters of administration in said estate in preference to Sarah S. Metzger, one of the parties to whom letters were granted."

A citation issued accordingly directed to the administrators and answer filed setting forth *inter alia* as follows:

a. "That personally the said Sarah Metzger and William Pfahler made no representations whatever to the register as to the number or character of the heirs and next of kin of the decedent, and that whatever representations of this character were made, were made by their attorney, C. E. Geyer, and that they are advised and believe that if the register received any wrong impressions as to the number and character of the heirs and next of kin, it was the result of a misunderstanding between the said attorney and the register.

b. "That said administrators are advised and believe that their attorney made inquiry of the register as to the necessity of a formal petition for letters as required by the Act of Assembly of 1917, and that the register thereupon informed said attorney that such form of petition was only required in the event of a contest for letters." The answer further alleges that letters were issued to Mr. Pfahler and Mrs. Metzger as a result of a verbal agreement between nephews and nieces of the decedent on the day of the funeral, and that Seesholtz, the petitioner, was present and concurred in such agreement. On this it is sufficient to say now that no agreement was filed of record to this effect, the register at the time he granted the letters had no knowledge thereof, and such agreement is emphatically denied by Mr. Seesholtz. Following a full hearing on February 26, 1918, the register filed the following order:

"After due and careful hearing on the above case, I consider it wise to revoke the letters granted to Sarah S. Metzger and William Pfahler, administrators in the estate of Catharine S. Sharpless, dated January 19, 1918, for the several reasons:

"First. As each of the administrators living out of immediate jurisdiction the estate is liable not to receive proper attention.

"Second. There seems to be a desire of a great number of heirs for a reversion of the present condition of administration.

"Third. To correct an honorable misunderstanding in the granting of the letters in the first instance.

"Fourth. It is my belief the estate will be managed to the satisfaction of all parties concerned and to greater advantage to the estate itself.

"And now, February 26, 1918, I hereby revoke the above letters for the above stated reasons.

"(Signed) GEO. E. CLEMMENS,
"Register of Wills."

From this order and decree of the register, William H. Pfahler and Sarah S. Metzger duly appealed, setting forth as reasons therefor and for the reversal of the order, that the action of the

register in revoking letters of administration was irregular and unlawful for the following reasons:

- a. Because the petitioner, Frederick P. Seesholtz, did not file a bond with the register prior to the issuing of the citation.
- b. Because such letters of administration were applied for and taken up by petitioner pursuant to the agreement of certain nephews and nieces on the day of the burial of the decedent to which agreement Frederick Seesholtz was a party and by which he is estopped from revocation proceedings.
- c. Because Frederick Seesholtz failed to invoke his remedy by caveat.
- d. Because the register has assigned no legal reasons for his action in revoking the letters of administration.
- e. Because the action of the register is unwarranted by the evidence at the hearing.
- f. Because the register was without authority to revoke letters of administration.

Service of a copy of petition for appeal was accepted and issuing and service of citation on said petition for appeal was waived by R. S. Hemmingway, attorney for Fred Seesholtz. All the parties appeared and testimony was taken on the appeal, September 3, 1918.

Since the institution of these proceedings W. H. Pfahler and Sarah Metzger, jointly, and Frederick Seesholtz filed formal petitions for letters as required by law.

It was contended by the administrators in their answers to the citation issued on the petition to revoke these letters and in their petition to appeal, and was urged upon us by their counsel in the argument, that the register was without authority to revoke these letters and that the remedy of Mr. Seesholtz was an appeal from the grant of letters of administration.

It is provided by Section 5 of the Act of June 7, 1917, P. L. 415, as follows:

"Any register of wills shall have power to revoke letters of administration granted by him; whenever it shall be made to appear to him that such letters have been granted to, or on the nomination of, persons who are not the next of kin of the decedent entitled to administer; or whenever, after the granting of letters of administration any will of the decedent shall be duly proved and admitted to probate."

In the report of the commission which drafted this Act it is said that this provision is new and is intended to be declaratory of the existing law. Prior to the passage of the Act referred to, there was no statutory enactment authorizing the register of wills to revoke letters, yet it was held in numerous cases since the old Act of 1832, which heretofore governed, that the register had a right to revoke the letters of administration for cause shown.

In Headley's Estate, 39 County Court Reports, page 165,

decided in 1911, it was held that if the register of wills inadvertently granted letters of administration he has power to correct the error and revoke them. Neidig's Estate, 183 Pa. 492, is to the same effect.

In McCaffrey Estate, 38 Pa. 331, it was held, the register has power to revoke the letters of administration improvidently granted against the rights of those legally entitled thereto.

In Shomo's Appeal, 67 Pa. 356, it was held that the register has no power to revoke except for cause. In this case the Supreme Court also clearly recognizes the right of register to revoke letters secured by misrepresentation.

These decisions and many others of like import, establish the right of the register to revoke in the instances cited in the absence of any direct statutory enactment giving him that power. And if Section 5 of the Act of 1917, referred to, was merely intended to be declaratory of the existing law, we seriously question whether the register is now limited in his power to revoke letters in the two instances cited in Section 5. He has said in the order filed revoking the letters that he does it "to correct an honorable misunderstanding in the granting of the letters in the first instance." Of the four reasons given by him in his order, this is the only one to which we are inclined to give serious consideration. The others seem to us to be without weight, and alone, would not justify his decree.

In the testimony of the register taken before us, he states on page 19 of the transcript, after relating the detail of the visit of the attorney for Mr. Pfahler and Mrs. Metzger, and the visit of Seesholtz, to his office complaining of his action:

"Q. So that was the first you knew of any other nephews and nieces? A. Absolutely, I would not have granted the letters without a petition as the law demands it, but as I understood they were the heirs making application for letters, it was not necessary, and that is the only reason why they were revoked."

In the petition filed by Mr. Seesholtz he alleges that these letters were granted without the filing of the petition now required by law to be filed before letters issue. He also alleges that the letters were issued by the register to Metzger and Pfahler under the impression that they were the only heirs and next of kin of the decedent. He also alleges that under clause C, Section 2, of the Act of June 7, 1917, P. L. , he is entitled to letters of administration in said estate in preference to Sarah S. Metzger. This latter reason, at least, is a jurisdictional one, giving the register the right to entertain the petition. He did entertain it, issued citation, parties appeared and full hearing was had and the letters were revoked.

From an examination of the proceedings had before the register, and from the testimony taken before us, we are convinced that the register was under a wrong impression at the time he

granted these letters as to the condition of the estate, heirs, etc. He swears positively he was deceived and that that led him to issue the letters without the filing of the formal petition now required.

It is true that Mr. Geyer, the attorney for the administrators, denies any misrepresentation on his part, but it was not done under oath, simply a statement by him in court in arguing his case after we had inquired of him if he desired to be sworn and he stated that he did not.

If there was any misrepresentation upon the part of the attorney it might not have been intentional, but it is clear to us from the record and from the testimony that the register was not fully informed when he granted these letters. We hold, therefor, that if misrepresentation or misunderstanding was established, and it is established to our satisfaction, the register had the right to revoke these letters.

However, there is another, and, perhaps, more compelling and powerful reason why the action of the register must be sustained.

By Section 2, clause D, of the Fiduciaries Act of 1917, P. L. 447, it is provided:

"Every application to any register of wills for the issuance of letters testamentary or of administration shall be in the form of a petition, duly verified by affidavit, setting forth the residence and citizenship, and the place, day and hour of death of the decedent; the estimated value of his property real and personal; the location of his real property; and in the case of an intestacy, the names and residences of the surviving spouse, if any, and of the next of kin of the intestate; together with an averment that the persons named are the surviving spouse and all the next of kin of the intestate."

This proviso is mandatory and the wisdom of the enactment is well illustrated in the present instance. Had it been complied with all of this litigation would have been avoided, and costs saved, to say nothing of delay. From the record and from the testimony, uncontradicted, the fact is established that no petition was filed at the time of the granting of these letters. And the act of the register in granting letters without this petition, even with or without misrepresentation as to the facts of the estate, was an error not of discretion, but of power. This appeal brings up the whole record, and where it appears to us that the letters issued to the appellants in this case were issued without compliance with the mandatory requirements of the Act of Assembly in such case made and provided, we have the right to take cognizance thereof and act accordingly. See Winklefoose's Est., 5 York, 151.

As to the contention of the appellants here that Mr. Seesholtz should have proceeded directly by appeal from the act of the register in granting these letters and not by petition to revoke,

we have to say that precisely the same question and the same conclusion would be before us and would have been reached had that course been taken. However, the matter is before us *de novo*, and where the decision or act of the register is affirmed, it matters little whether the register acted first in the revocation or not. See McCaffrey's Est., 38 Pa. 331.

As to the contention of the appellant that the petition of Frederick Seesholtz to the register to revoke these letters is void and could not have been proceeded in because he failed to file a bond for costs, we hold that no such bond in that kind of proceeding was required by law. Having disposed of the matter on other ground, we do not feel called upon to decide the question involved as to the right of Frederick Seesholtz to be preferred in the administration as against Sarah S. Metzger, in the circumstances of this case.

From the evidence before us it is clear that William Pfahler and Sarah Metzger were personally innocent of any misrepresentation to the register in connection with the granting of letters to them. Their personal fitness is not questioned, and they did proceed after their appointment with facility and dispatch in the administration of the affairs of the estate.

The condition of the estate, the whereabouts of the assets, etc., is known to each of them, and we are strongly of the opinion that the interest of the estate would require that at least Mr. Pfahler should be renamed as the administrator of the estate, or one of the administrators, if the register sees fit to appoint two. While there is some conflict in our decisions as to the right of the Orphans' Court upon revocation of letters to direct to whom they shall issue, the weight of authority seems to be in favor of that right and it was distinctly recognized by our Supreme Court in *In Re Estate of Samuel Neidig*, 183 Pa. 492.

We mean no reflection upon Mrs. Metzger, whom we know to be a personally fit and proper person, but under the law she could not be named alone in this estate to act in case of protest by reason of the law preferring males to females. We will not take unto ourselves, however, the authority to direct to whom letters shall issue, but we refer the matter to the register for action, strongly suggesting to him that William H. Pfahler and Fred Seesholtz be appointed administrators of this estate, and in case one should decline to serve jointly with the other, then to name the one who did not decline to serve jointly, to act alone.

The decree of revocation of the letters granted in this estate by the register is affirmed, and the appeal is dismissed. As the appellants are innocent parties in the whole transaction, we do not think it proper that payment of costs should be visited upon them and it is accordingly ordered that the costs be paid out of the estate.

Court of Common Pleas of Luzerne County.**GARDNER *et al.* v. LEHIGH VALLEY RAILROAD Co.**

Negligence—Burns from explosion—Wood alcohol—Direct cause of explosion—Non suit.

An employe was burned fatally by explosion in tool house. Testimony showed there was on premises a quantity of wood alcohol in a kerosene oil barrel, but plaintiff's witness testified that barrel was tight and spigot properly closed; other testimony that from a barrel not perfectly tight explosive fumes would escape and could be ignited by naked light, and that wood alcohol is usually kept in specially prepared barrels, the barrel in question not being that type; no direct testimony as to cause of explosion or that naked light was used.

Held, that non suit was properly granted.

Trespass. Rule to take off non suit. Common Pleas, Luzerne county. No. 103, May term, 1913.

GARMAN, J., January 2, 1919.—The plaintiffs seek to recover damages for injuries to their son, Vivian, seventeen years old, which injuries resulted in his death.

The boy, Vivian Gardner, was employed by the defendant company at Coxton as a "tool boy". His duties were to go to the tool room and get the engineer's equipments and place them on the engine about to be taken out of the round house to go to different points on defendant's railroad. The tool box contained a hammer, monkey wrench, chisel, hand oiler and three oil cans. When an engine came in from a trip the crew removed the tools from the engine and a man named Thomas Redington placed them in the tool house, but when the engine was to go out young Gardner's duty was to get the tools to the engine.

On Saturday evening, April 27, 1912, between 7:30 and 8 o'clock, the boy entered the tool house to get the tools of an engineer named Oliver Horton. The tools had been placed up in the second floor of the tool house, whither Gardner proceeded to get them, and while he was there the accident occurred.

A summary of such part of plaintiffs' evidence as will be necessary to review the action of the Court in allowing the motion for a compulsory non suit is as follows:

Thomas Redington: The accident happened between 7:30 and 8 o'clock. It was dark at the time. The tool house was a building about 8 by 15 feet. The room downstairs was about 10 feet high. The upstairs room was pitch-roof. I could stand and touch the ceiling with my hand at the lowest part. At the highest part to the roof was about 12 or 14 feet, floor space about 8 by 15 feet. The building was a frame building attached to the stone round house. The second story was not provided with any system of lighting. Gardner came from the round house and came

from the outside into the tool room. About five minutes before the accident he was standing talking to me in the tool room down-stairs. He carried in his hand an unlighted torch, which, when lighted, burned kerosene oil, with a naked flame. He asked me where he would find Horton's tools and I told him Horton's tools had been put upstairs. I went out to carry tools in. While I was out Gardner went upstairs. When I entered the tool room he called to me and asked me how he was going to tell which tools they were. I told him the tools were marked. And I heard him walk across the floor and stop about a minute, and bang came the blaze of fire. There was just a little jar. The fire came through the floor on me, then my clothes caught fire and I ran out. While I was taking my clothes off outside Gardner opened the door and ran by me to the river. I didn't notice any flames; he just ran with his hands above his head." Cross examined, the witness said: "Didn't hear any sound or any noise or anything like that; just the jar."

Isaac Stark: "When we were undressing Gardner I said to him: 'What happened, Vivian,' and he said, 'I was over hunting for the oil can and there was something exploded up in there.'"

James Gardner: "Q. Proceed to relate what your son said in the power house with reference to how this accident happened? A. Why, he said there was an explosion; I don't remember just the words that he used, any more than he said there was an explosion and set him on fire and he got out as quick as he could."

Charles Vanderburg: "From three to four days before the accident I stored in the second floor from fifteen to twenty gallons of wood alcohol, in a kerosene oil barrel, with the faucet all plugged up right. The barrel, in good condition, was brought in empty and the wood alcohol in five-gallon cans. The barrel stood on end, was tight, had no leaks in it, and had a spigot, which was closed. The room had a window having about thirty or thirty-five panes of glass and opening into the round house, but having about one-half of the panes broken out."

Thomas W. Burke called as an expert: "According to my opinion, wood alcohol goes as an explosive. It gives off gas and will explode. This gas when given off from the main body will explode in coming in contact with a naked lamp or naked flame. I never saw wood alcohol put in an oil barrel. Alcohol is supposed to go in alcohol barrels specially prepared for alcohol. A specially prepared alcohol barrel it is necessary to have a coat of glue, and in the interior of the barrel, so as to retain the barrel in its solid position so the alcohol won't leak out and cause discoloration. Each and every barrel has got to have a coat of glue inside the barrel in order to retain the alcohol, otherwise an oil barrel is liable to shrink under heat and let the alcohol out—one pound of glue to each barrel. A barrel that was partly filled with

alcohol, and stood on end, the upper end may be liable to shrink the wood and the vapors to escape through the wood. We have had some alcohol, partly filled barrels, stood them on end, the upper part of the barrel would not come in contact with the moisture where the alcohol did not reach the top of the barrel partly filled, would shrink—the atmosphere of the room under heat would shrink the wood and allow the vapors to escape through the seams. An explosion would be like any other gas explosion, some sudden report or jar, as it were, and will be followed by fire."

On cross examination: "If the barrel was in real good condition and the faucet closed perfectly and no fumes escaping there would be no danger of any explosion at all."

The evidence establishes that, as a result of an explosion on defendant's property, plaintiffs' son received burns which resulted in his death; that decedent, with an unlighted torch, was seen to enter the room where the explosion occurred; that in that room was stored a barrel containing wood alcohol; and that if the barrel or the spigot thereof was not tight, the wood alcohol might be converted into gas which would explode by contact with a naked flame. But the plaintiffs' evidence also establishes that the barrel was in good condition, was tight, had no leaks in it, had a faucet which was all plugged up right and had the spigot closed.

It will be observed that there is absolutely no evidence as to the cause of the explosion, nor is there any expert opinion as to its cause. The most that can be said for the evidence is that it establishes that there was an explosion; that wood alcohol was in a barrel on the premises; that wood alcohol may be liable to escape if contained in a partly filled barrel and the barrel placed on end; and that alcohol is supposed to go in alcohol barrels specially prepared for alcohol. There is no evidence as to the custom of the trade in wood alcohol nor opinion expressed as to the cause of the accident. Therein the case differs from *Denardo v. Stephens-Jackson Co.*, 261 Pa. 230, on page 233, where Mr. Justice Walling says: "Where the evidence points to a certain cause for an accident, which would fasten liability upon the defendant, the plaintiff will not be denied redress, because there may be some other possible cause for the accident."

To allow the case to go to the jury, we must permit them in the teeth of plaintiffs' evidence, as given by Vanderburg, that "the barrel stood on end, was tight, had no leaks in it, and had a spigot, which was closed," and of Burke that "if the barrel was in real good condition and the faucet closed perfectly and no fumes escaping, there would be no danger of any explosion at all"—to guess that, because a barrel thus stood on end and partly filled may be liable to shrink and to let the vapors escape through

the wood, it did so escape and to guess that wood alcohol thus escaping caused the accident.

The evidence shows that if wood alcohol gas were in the room where decedent was injured, an explosion would occur if a lighted naked lamp came in contact with the gas; but there is no direct proof of the existence of such gas nor of the presence of a naked flame.

Under all the evidence we were and still are of the belief that *Lodge v. United Gas Company*, 209 Pa. 554, controls this case. In their *per cur.* opinion the Supreme Court ruled that the cause of the explosion cannot be established by "mere conjecture".

The rule to take off non suit is therefore denied.

W. W. Hall, F. A. McGuigan, for plaintiffs.

E. C. Jones, for defendant.

SALMON *v.* L. V. R. R. Co.

Non pros—Laches—Statement.

Unexplained failure of plaintiff to file a statement for a period exceeding the pertinent statute of limitations, and under certain circumstances for a lesser period, particularly where the limitation is six years, warrants entry of *non pros*.

Motion for non pros. Common Pleas, Luzerne county. No. 78, January term, 1915.

FULLER, P. J., May 9, 1918.—When a person claiming to be injured brings an action which he allows to lapse into inaction by absolute quiescence for more than three years without filing a statement, making a single move, or suggesting a scintilla of excuse, a Court is entirely justified in the conclusion that the plaintiff, conscious of having no just claim, has abandoned further prosecution of his case.

We state as a general proposition of law, applicable to the present case and innumerable others which come before us from time to time, that the unexplained failure to file a statement for a period exceeding the pertinent statute of limitations, and under certain circumstances even for a lesser period, particularly when the limitation is six years, warrants entry of a *non pros*.

If a plaintiff has a just cause, he will be diligent to press for trial. If he is not diligent to press for trial, it is reasonable to infer that he has not a just cause and has forsaken his claim, and, if so, his action should be quashed.

A defendant has the right, upon which in motions of this character he may justly stand without taking a single step, to be speedily informed of the accusation at least in general terms.

This case is governed by the principles above suggested and consequently the motion for *non pros*. is allowed.

J. R. Halsey, for defendant.

SCRANTON FLOUR & GRAIN CO. v. MAIER.

Affidavit of defense—Practice Act—Supplemental affidavit—Rule of court.

1. Practice Act makes no provision for supplemental affidavit of defense except under Section 20 on raising question of law.
2. Where defendant's affidavit denies pith of statement as to terms of selling contract but fails in specific denial of particular allegations, rule of court may be invoked for permission to file supplementary affidavit.

Rule to enter judgment for want of sufficient affidavit of defense. Common Pleas, Luzerne county. No. 132, May term, 1916.

FULLER, P. J., December , 1918.—Plaintiff's statement contains eight paragraphs, averring in substance, a contract by defendant, September 9, 1915, for sale of one carload, 1,500 bushels, of natural white oats, at $39\frac{1}{2}$ cents a bushel, and for delivery of same in good merchantable and marketable condition, (2) breach of the contract by delivery of oats which were rotten, spoiled, unmarketable and unmerchantable, (3) consequent rejection by plaintiff and constraint of the latter to buy elsewhere at an aggregate advance in price of \$108.75, for which the action is brought.

By the affidavit of defense "the defendant denies the facts set forth in paragraphs 1 to 7, of the plaintiff's statement," to which form of denial objection is now urged on the ground of violating Section 8, "Practice Act, nineteen fifteen", viz.: "It shall not be sufficient for a defendant in his affidavit of defense to deny generally the allegations of the statement of claim * * * but he shall answer specifically each allegation of fact of which he does not admit the truth."

The objection, of course, is well taken, and if the affidavit went no further, the rule should be made absolute.

But the affidavit proceeds to deny specifically "that on September 9, 1915, he ever sold or agreed to deliver to the plaintiff a car of natural white oats to contain 1,500 bushels at a price of $39\frac{1}{2}$ cents per bushel"; and further avers "that on September 3, 1915, he sold to the plaintiff one car of natural white oats at $39\frac{1}{4}$ cents per bushel"; and further, "that said car of oats was delivered to the plaintiff at Scranton, Pa., in the month of September, 1915, as agreed, in a good marketable condition, but notwithstanding the same, the plaintiff refused to accept said car."

These averments fairly answer the pith of the plaintiff's statement, and so we will not make the rule absolute at this time; but as the plaintiff is entitled under Section 8 aforesaid to have a specific denial of his every allegation, we will make the rule absolute unless within fifteen days after notice hereof the defendant files a supplemental affidavit correcting the deficiency.

In this connection it is proper to mention, as a point which may hereafter give trouble, that the Practice Act of 1915 makes no provision for a supplemental affidavit of defense, except under Section 20, after one raising a question of law, and therefore in this case we must rely for that privilege upon our present rule of court.

B. W. Davis, J. G. Sanderson, for plaintiff.
G. J. Ritchie, for defendant.

TKATCH *v.* THE KNIGHTS AND LADIES' SECURITY.

Beneficial societies—Laws—Proof of—Burden of proof as to payment of dues, etc.

On suit by widow for death benefits assured by beneficial society in case of death of husband, defense was made on ground of non-payment of dues, and because deceased had contrary to laws of organization engaged in retailing of liquor.

Held, That laws of organization cannot be proved by expert, on the test of his familiarity therewith. If such book of laws is admitted, it must be on credibility of expert's testimony as to identity of contents with the laws of the organization. Where plaintiff has submitted certificates, death, and proof of service of death, presumption is created that dues, assessments, etc., have been duly paid, and burden is on defendant to show otherwise.

Motion for new trial and for judgment n. o. v. Common Pleas Luzerne county. No. 285, October term, 1915.

STRAUSS, J., August 13, 1918.—In 1910 the defendant issued a certificate in the nature of a life insurance policy, and in 1912 another, to Andrew Tkatch, the first for two thousand dollars and the second for one thousand dollars, payable at the time of his death to Annie Tkatch, his wife, the plaintiff, "he having complied with all the provisions of the constitution and laws of the order now in force, or that may hereafter be enacted, and being at the time of his death a member in good standing." He died on December 29, 1914.

The defendant having refused payment on these certificates on the ground that Tkatch had become a vender of intoxicating

liquors in violation of the laws of the organization, this suit was brought.

At the trial the plaintiff put in evidence the certificates, the death, service of proof of death, and rested.

A motion for compulsory non-suit was refused. Then to make out its defense the defendant proposed from its constitution and by-laws to prove: (a) The defendant is a beneficial society and not a life insurance company; (b) the deceased was forbidden to engage in the manufacture or sale of any intoxicant liquors to be used as a beverage.

And to follow this by proof (c) that the deceased had in violation of the constitution and by-laws become a licensed retailer of intoxicants after the date of the death benefit certificate.

The proof of the constitution and by-laws the defendant offered to make by a witness who having been one of defendant's members during many years and an official in its subordinate, State and national lodges, could qualify as an expert and would identify a pamphlet as the officially printed and commonly accepted in these organizations, constitution and by-laws. This proposed identification of the pamphlet by expert testimony was objected to and excluded. Thereupon defendant rested.

A new trial or judgment in defendant's favor *n. o. v.* is now sought for two reasons: 1. Because the plaintiff has failed to prove as part of her case that her husband had paid all dues and assessments chargeable against him up to the time of his death; and 2, because the Court erred in excluding the expert testimony.

1. The allegation in the statement that all conditions of the contract had been fulfilled by the assured, even when denied by the answer, does not impose upon the plaintiff the burden of proving that each particular condition was complied with. When a breach of any particular condition is relied upon, the defendant has the burden of proving it. The certificates in the hands of the defendant promising to pay a specific sum to her on the death of her husband created in her favor a presumption that the deceased had paid the dues essential to the original validity of the certificate, which presumption continues until it has been overcome by proof that validity is lost through non-payment or other violation of conditions. 29 Cyc. 229-237; Royal Circle, etc., *v.* Achterrath, 204 Ill. 549; Crumpton *v.* Pittsburg Council, 1 Super. 623.

2. No authority has been brought to our attention for the proposition that the laws of a beneficial society may be proved by expert testimony of a witness because of his familiarity with them or with the practice in the organization. If the book were to be admitted at all it must be upon the credibility of his testimony as to the identity of its contents with the laws of the organization.

We had before us at the time of trial *Herman v. The Supreme Lodge*, 48 Atl. Rep. 1000 (Supreme Court of New Jersey) which decided: "It is too plain for argument that in order to vary an existing contract, strict proof of the enactment of the law claimed to have such effect is requisite. Proof by members of the order that copies of what purported to be the laws extant had been promulgated could not legally stand in lieu of direct proof of such enactment."

This doctrine is also followed in *Page v. Knights & Ladies*, 61 S. W. 1068, where such evidence had been admitted after a witness had testified that he had before him: * * * "the constitution and by-laws of the order which went into effect May 1, 1898, and file it as Exhibit A to my deposition."

The Court in sustaining an exception on this ground said: "It is obvious, therefore, that when the witness made the statement, he was stating merely an inference or conclusion of his that the paper offered was legally the constitution and by-laws of the order. But this cannot be done. *Supreme Lodge v. La Malta*, 85 Tenn. 166-67; 31 S. W. 493; 30 L. R. A. 838. The Court would have to have before it legal evidence of the action of the Supreme Lodge or of its board of directors in the passage or admitted passage of such constitution and by-laws, and from this a conclusion could be drawn as to whether the paper offered was in truth the constitution and by-laws of the order and legally binding as such. But this would be a legal conclusion and one for which the Court could not rely upon the opinion of a witness in the cause."

So, all of the decided cases that have been referred to in the briefs, or that we have by independent search been able to find, are in line with the ruling made at the trial under which this sort of evidence was excluded.

The case is presented to us purely upon these legal questions without any appeal to discretion. As thus presented both reasons must be dismissed.

Motion for new trial and motion for judgment in favor of the defendant *n. o. v.* are refused, and the prothonotary is directed to enter judgment in favor of the plaintiff upon the verdict.

C. B. Lenahan, E. A. Lynch, for plaintiff.
J. H. Dando, for defendant.

BALDWIN *v.* MOYLES *et al.*

Judgment—Opening—Bond and mortgage—Agreement to give notice of foreclosure.

After sale of property under foreclosure proceedings on mortgage, full amount of debt not having been realized, the bond was entered to secure remaining sum. Petition to open judgment on bond contained principal averment that plaintiff's attorney had failed to give notice according to agreement to one of defendants of foreclosure proceedings. Averment met by denial on part of plaintiff's attorney of such agreement.

Held. Where there is no proof that attorney had authority from his principals to limit the tenor of bond and mortgage; agreement or non agreement merely oath against oath, no consideration shown, and agreement not contemporaneous with execution of bond and mortgage, plaintiff cannot be bound, nor can the effect of his security be limited.

Rule to open judgment. Common Pleas, Luzerne county. No. 216, March term, 1917.

O'BOYLE, J., February, 1919.—This case comes before us on a rule to open a judgment entered of record, upon a bond accompanying a mortgage, which was placed on property located in Allentown, Lehigh county, Pa., for \$5,450, executed by the defendants above named, and upon which a payment of \$450 had been made by defendants, reducing the sum due on said bond and mortgage, to \$5000.

It appears that foreclosure proceedings upon said mortgage were instituted in the fall of 1916, and the property was sold for \$4550, and that, January 24, 1917, in view of the fact that the total amount of the indebtedness was not realized from the sale of the property, the bond which accompanied the mortgage was entered to No. 216, March term, 1917, in the Court of Common Pleas of this county, by C. E. Keck, counsel for plaintiff, for the sum of \$1101, which he claims was due, with interest, from December 29, 1916; and that upon demand having been made by Mr. Keck for the payment of this sum, the rule referred to was granted, to show cause why the judgment should not be opened, and the defendants let into a defense.

The principal averment in the petition for the opening of the judgment is, the failure on the part of plaintiff's attorney, William LaMonte Gillette, to give notice to Charles M. Bowman, one of the defendants, prior to the institution of any proceedings of foreclosure of the mortgage, as alleged, the said attorney had promised Mr. Bowman he would do, at a meeting which they had, in April, 1916.

In the answer filed by the plaintiff's attorney to the defendants petition, it was distinctly denied by William LaMonte Gillette, attorney that there was any agreement whatever entered

into by him, that he was to give notice to Mr. Bowman, previous to foreclosure proceedings, or that there was any agreement entered into that he was to make demand of Mr. Bowman, before proceedings to collect the amount represented by the bond and mortgage.

In this application to open the judgment, we are confronted by the averment on the one side that notice was to be given, and on the other, a positive denial of such an understanding or agreement.

Bonds and mortgages are solemn instruments, when once entered into, and should not be lightly overthrown.

In the first place, there is no proof that William LaMonte Gillette had any authority whatever to limit or circumscribe the full purport and tenor of the bond and mortgage; and it would be a violent presumption to assume that one, acting for a person in the capacity of attorney, to issue a *sci. fa.* and collect a debt due upon a mortgage or a bond, would have authority to tell one of the mortgagors that he would not take any steps to collect the indebtedness until he had given notice to him of his intention to do so. Where the alleged omission to give this notice becomes of such importance as to be the basis for application to open judgment entered upon such an instrument, the burden is a heavy one, on the part of the defendant, to clearly establish that the counsel making the statement had the authority of his principal to do so, and to show that there was some consideration for this agreement.

In our view, it would be a matter entirely outside the scope of a lawyer, employed to collect by foreclosure proceedings, the amount due on the bond and mortgage, to have authority to make such a stipulation.

We are unable to see, even if this statement were made by counsel for the plaintiff, in view of the testimony in the case, that actual notice had been given to the defendants, by their local attorney, at Allentown, Richard W. Iobst, Esq., how it could avail as a defense against the claim of the plaintiff. This amount is claimed to be due as a balance not realized from the sale of the property covered by the mortgage; and, until that sale is set aside, by proceedings instituted in Lehigh county, it is a mere matter of mathematical calculation here, as to the amount due upon the bond.

There is another reason why we are unable to comply with the request of the defendant to open the judgment, and we think it vital in this case—that the sole witness called by the defendants in an effort to overcome the denial contained in the answer, is one of the defendants, Charles M. Bowman; and his testimony, standing alone, is insufficient to overcome the sworn answer.

It was held in the case of *Lockard v. Kayser*, 13 Superior

Court, page 172: "On application to open a judgment, the Court is governed by equitable rules, and a responsive answer to the petition must be overcome by the evidence of two witnessess, or of one witness and corroborating circumstances."

It was stated in *Heilner v. The Falls Coal Co.*, 9 Superior Court, page 78, as a legal proposition, that: "In order to have a judgment opened, a *prima facie* meritorious defense must be established by something more than oath against oath; and, if nothing more be shown, it is the duty of the Court to discharge a rule to open judgment."

The agreement on which the defendants base their claim for relief, in their application to open this judgment, is very unusual; and, so far as we can discover, it was without consideration, and not contemporaneous with the execution of the bond and mortgage. Even if admitted to be true, it was, at best, a mere promise, which one member of the bar might make to another member; but which, if entered into good faith, could in nowise bind the plaintiff, or limit the effect of his security.

Rule discharged.

C. E. Keck, for plaintiff.

B. W. Davis, C. M. Bowman, for defendants.

NAT'L CASH R. CO. v. EDWARDSVILLE U. CO-OPER. ASSO.

Replevin—Intervening defendant—Sale for rent—Title—Affidavit of defense.

Where cash register leased to defendant has been seized in distress for rent, and bought in at constable's sale by landlord, affidavit of defense to replevin by owners of machine insufficient unless indicating that every condition in proceedings on landlord's warrant has been complied with. Warrant or certified copy thereof should be attached to affidavit, all preliminary steps required by law to justify sale on landlord's warrant must be averred, and copies of papers attached.

Replevin. Rule for judgment for want of sufficient affidavit of defense. Common Pleas, Luzerne county. No. 1155, October term, 1915.

GARMAN, J., January 15, 1919.—Plaintiff brought an action of replevin to recover one National Cash Register from the Edwardsville Union Co-Operative Association as defendant. W. M. VanHorn presented his petition and was allowed to intervene as defendant. Plaintiff's statement averred that the machine was claimed by plaintiff under a contract in writing executed by defendant and accepted by plaintiff; that defendant broke its contract by violating the following provision thereof: "It is agreed that upon failure of the undersigned to make any pay-

ment of rental, or upon the issuing of any attachment execution, distress for rent, or like process against the undersigned or in the event of the undersigned becoming insolvent or the filing of a petition of bankruptcy by or against him the unpaid balance of the rent for the entire term shall at once become due and payable and you may immediately take possession of the said register;" and that before the writ of replevin issued there had been default in the payment of rentals under said contract.

Defendant, VanHorn, filed an affidavit of defense wherein he averred that the Edwardsville Union Co-Operative Association was a tenant; that the machine was taken to the leased premises; that a landlord's warrant was issued, levy made *inter alia* upon the machine and that it was sold to affiant at public sale upon the warrant.

Exception being filed to this affidavit of defense and rule for judgment taken, a supplemental affidavit was filed more fully setting forth the facts and still claiming title through the public sale by landlord's warrant. To this supplemental affidavit of defense exceptions were also filed. The exceptions are as follows:

1. To the affidavit of defense:

"The intervening defendant says that the constable who conducted the public sale gave the intervening defendant title and possession to the above-named cash register, which is not sufficient to prevent judgment."

2. To the supplemental affidavit:

"Defendant says that he purchased the cash register sued for at landlord's sale for rent:

"(a) But he does not deny that there was a lease between the plaintiff and defendant.

"(b) He does not set forth the formal requisites required by the Act of Assembly to make out a good title on a landlord's sale.

"(c) He does not attach copies of the various papers alleged to have been served by the constable.

"(d) The lease attached is signed by no one."

An extended discussion of this case is not needed. The affidavit of defense must clearly show that every step in a proceeding upon a landlord's warrant has been complied with. The warrant or certified copy thereof should be attached to the affidavit and all the preliminary steps required by law to justify a sale on a landlord's warrant must be averred and copies of the papers attached. The affidavit and supplemental affidavit are not sufficient and the rule for judgment is made absolute. Citations of authorities is unnecessary.

Reynolds & Reynolds, for plaintiff.

W. A. Valentine, for defendant.

PAYTON *et al.* v. UPPER LEHIGH COAL CO.

Negligence—Contributory negligence—Repairing machinery while same is in motion.

Where one in charge of machinery at a coal washery, having entire direction and control thereof, undertakes without direction by any representative of employer to repair machinery while same is in motion, the usual and safe method being to make such repairs after work has ceased, and where in making such repairs employe is caught and fatally injured, it is proper to enter non suit.

Rule to take off non suit. Common Pleas, Luzerne county. No. 27, February Term, 1913.

O'BOYLE, J., February, 1919.—This was an action instituted by Gladys Peyton, widow of William Peyton, in her own right, and in behalf of three minor children, for the death of her husband, and father of her children, through the alleged negligence of the defendant company, in failing to provide signalling apparatus near the place of his employment, so as to give an opportunity of signalling the engineer in time for him to stop the engine which propelled the drive shaft, ropes, chains, carriers and pulleys, so that the said drive shaft ropes, chains, carriers and pulleys, could have been stopped before he was killed, on December 16, 1911, while the said William Peyton was repairing a jig, which was a part of the machinery of a washery, at or near the breaker of the defendant company.

It appears that the said William Peyton, deceased, was the foreman or person in charge of the washery in question, and that everybody who was employed in the washery and around the washery, as was stated by one of the witnesses, was under him, and bound to take his orders.

When the plaintiff had presented its case, counsel for defendant company moved the Court to enter a compulsory non suit, on three grounds: First, "No negligence has been proven against the defendant which was in any way responsible for the decedent's death."

Second. "The plaintiff's decedent assumed the risk of the employment in question."

Third. "The plaintiff's decedent was guilty of contributory negligence."

The Court then sustained the first reason, and stated at the time, that all three propositions might be sustained, but that it was only necessary to sustain the first.

The deceased, being the one in authority, having charge of the work, voluntarily put himself in known danger, and contributed to the loss of his own life, without any interference whatever on the part of any representative of the defendant company, and hence, we are constrained to allow the motion on the first proposition, that "no negligence has been proven against the defendant which was in any way responsible for the decedent's death."

Since the entry of non suit, upon the ground stated, we have carefully examined this case, and, while a rule was entered by the Court at the time of the non suit, on the plaintiff, to show cause why the non suit should not be lifted, nothing since has been done by plaintiff's attorney in support of the rule. And hence, we have concluded, for this, as well as other reasons, that the plaintiff's counsel has acquiesced in the correctness of the judgment of the Court, in entering the non suit.

In reaching an adjudication of the questions involved in the motion to lift the non suit, granted at the time of the trial, and in order to justify our ruling, we recognize the fact, that under the law, we are required to hold that the plaintiff is entitled to the benefit of every fact and inference of fact, which fairly might have been found by the jury, as drawn by them from the evidence before them. *Bank v. Carr*, 15 Superior, 346; *Bastian v. Phil'a*, 180 Pa. 227.

With this legal principle in mind, the testimony is so clear that the deceased was in charge of the washery in which the jig was operated, and that he had direction and control of the entire machinery at that point, and that it was usual to make the necessary repairs to the jigs, where the defendant had lost his life, after work had ceased, and while the same was not in operation, that it seems inexplicable why this experienced person would attempt to repair the machinery while it was in motion, instead of waiting until the machinery had been stopped, or until the work had ceased, after quitting time.

In the case of *Carll v. Brown*, reported in 251 Pa. State Reports, at page 273, it was held: "In an action by an employe to recover damages for personal injuries sustained while filling an oil cup attached to machinery in defendant's lumber mills, a non suit was properly entered where it appeared that the cup was in dangerous proximity to moving machinery; that plaintiff had not been instructed to fill the cup while the machinery was in motion, or at any particular time; that it needed to be filled but once a day, and that he could have done it at intervals during the day

when the machinery was stopped or in the evening after the day's work was over, when he was required to be at the mill for the purpose of cleaning up."

Under any aspect of this case, we are unable to see that we were in error at the time we entered this non suit, and hence, will not disturb it.

S. S. Herring, for plaintiffs.
J. H. Bigelow, for defendant.

BEISHLINE *v.* KAHN.

Practice Act 1915—Judgment—Entering before return day.

1. Where plaintiff has entered judgment for want of an affidavit of defense, fifteen days after service of statement but before return day of the writ, judgment will be stricken off, following *Rigel v. Ins. Co.*, 19 *Luzerne*, 312.
2. But minority opinion is that Under Section 12, Practice Act 1915, entry of judgment by prothonotary may be made after the fifteen days period, though before return day. This accords with purpose of Practice Act to allow speedy judgment on a claim to which there may be no defense, without delay of waiting for a technical return day.

Rule to strike off judgment entered for want of an affidavit of defence. Common Pleas, Luzerne county. No. 647, July term, 1917.

FULLER, P. J., December, 1918.—In this case the plaintiff, relying upon the Practice Act, 1915, entered judgment for want of an affidavit of defense, fifteen days after service of statement, but before the return day of the writ.

The defendant, on the return day, filed an affidavit of defense and took this rule to strike off the judgment on the ground of its entry before the return day.

This presents a question of practice on which judicial opinion here and elsewhere is strikingly divided.

In *P. & R. C. & I. Co. v. Stambaugh*, 26 D. R. 275, Judge Sadler of Cumberland county, indicated an opinion adverse to the entry of judgment, and his view was adopted by Judge Woodward of this county, in *Rigel v. Birmingham Fire Insurance Co.*, 19 *Luzerne*, 312; 27 D. R. 1012.

The same view had been before expressed by Judge Witmer, District Court U. S., in *Watson v. P. R. R. Co.*, 25 D. R., 1034.

On the other hand, we find opinions sustaining the entry of judgment by Judge Hause of Chester county, in *Curry v. Railway Co.*, 26 D. R. 802; by Judge Kunkel of Dauphin county in *American Lumber & Manufacturing Co. v. Ensminger Lumber Co.*, 26 D. R. 1051, and by Judge King of Armstrong county, in *Shipley Massington Co. v. Golden*, 27 D. R. 953.

In this conflict of opinion the judges of this court, while divided in their own views on the legal merits of the question, think wise to stand by the precedent established here in the decision of Judge Woodward, and accordingly the rule to strike off the judgment is made absolute, with the following expression, however, of the minority opinion.

That opinion is based upon the plaintiff's indubitable right to file and serve his statement at any time before or after the return day, and upon the explicit provision of the Practice Act in Section 12, that "the defendant shall file an affidavit of defense to the statement of claim within fifteen days from the date when the statement is served upon him."

The opposing opinion is based upon the practice in assumpsit anterior to the Practice Act, and upon the incongruity of entering judgment before the defendant by the exigency of the writ is required to be in court.

Said anterior practice was derived from the Act of March 28, 1835, P. L. 89, and Act May 25, 1887, P. L. 272.

The Act of 1835 expressly provided for judgment after the return day.

The Act of 1887 expressly imposed the duty of filing an affidavit of defense "on or before the return day," which, of course, prevented judgment until after the return day.

It seems very clear, therefore, that the anterior practice does not answer the question, and that the answer must be sought in the Practice Act itself.

Under Section 12 of that Act, as above quoted, the defendant is in default if the affidavit be not filed within fifteen days after service of statement, and under Section 17 the prothonotary may enter judgment for want of an affidavit.

To say that this means judgment after the return day writes into the Act something which it does not contain, on the sole argument of construction *in pari materia* with other acts which are radically different.

Against the mandate to file within fifteen days from service of the statement, it is of no consequence that the summons is to appear on the return day. The defendant is sufficiently apprised of his duty by the notice endorsed upon the statement under Section 10 of the Act.

The summons in replevin likewise, is to appear upon the return day; and, therefore, on every point of comparison the case is pat with *Griesmer v. Hill*, 36 Superior 69, which unequivocally answers the questions in the affirmative.

This accords with the unmistakable purpose of the Act to allow speedy judgment as justice demands, on a claim to which there may be no defense, without the unjustifiable delay of waiting for a technical return day which may be long deferred.

OTT v. MARK CONSTRUCTION CO., INC.

Mechanic's Lien—Act 1901—Sects. 34 and 35—Constitutionality.

Mechanic's Lien, Act 1901, in so far as it extends the remedy from one *in rem* to one *in personam*, is obnoxious to Art. III, Sec. 7, Constitution of 1874, and is unconstitutional.

Rule to strike off judgment. Common Pleas, Luzerne county. No. 218, January term, 1918.

FULLER, P. J., May 9, 1918.—This judgment was entered in a *scire facias sur* mechanic's lien against the contractor as in a personal action, on the supposed authority of Sections 34 and 35 of Act June 4, 1901, P. L. 431, and two grounds are urged in support of the rule, viz.: (1) that the service of the writ was invalid, (2) that said sections, *quo ad hoc*, are unconstitutional because they extend the ante-constitutional procedure *in rem* to a new procedure *in personam*.

We will pass over the first ground without consideration, because we sustain the second.

The Supreme Court has firmly and flatly decided that Section 7, Article III, of the Constitution, prevents any extension of the remedy by mechanic's lien beyond the limits existing and recognized at the time when the Constitution was adopted; and in accordance with the principle thus defined, that Court has explicitly said, in *Sterling Bronze Co. v. Syria Association*, 226 Pa. 475: "Any new method for the collection of the debt or for the enforcement of the judgment provided by the Act of June 4th, 1901, P. L. 431, which gives the right to proceed in a personal action against an owner or contractor, is obnoxious to Article III, Section 7, of the Constitution of 1874, and cannot be enforced by a proceeding *in rem* to bind the building by a lien properly filed against it."

Counsel for plaintiff contends that the foregoing utterance was *obiter dictum*, but we cannot agree with him, and even if it were *obiter dictum*, opposed to our own views, which is not the case, we would not have the temerity to dispute a proposition so plainly enunciated by the appellate tribunal.

Counsel also cites as if *contra*, *Atlantic Terra Cotta Co. v. Carson*, 53 Superior 91, affirmed by Supreme Court, 248 Pa. 417, and *Seelar East End Mantel & Tile Co.*, 58 Superior 119, which do indeed sustain certain provisions of the Mechanic's Lien Law on

details of procedure, including the affidavit of defense required by Section 34, but in so doing expressly define the distinction pertinent to this case, *viz.:*

"Any new statute which changed the nature of the action and permitted a personal judgment to be entered against the party named as defendants * * * would involve a change in the method of collecting this special class of debts. The proceeding must continue to be one *in rem.*" (53 Superior, at page 97.)

We can add nothing to the exhaustive discussion of the whole subject by Judge Porter in the case just cited, and by Judge Rice in *Sumption v. Rogers*, 53 Superior 109, which review and analyze at length the decisions of the Supreme Court.

On the ground, therefore, that the Mechanic's Lien Act of 1901 is unconstitutional so far as it undertakes to extend the remedy from one *in rem* to one *in personam*, we make this rule absolute.

H. B. Hamlin, for plaintiff.

Edward Hopkinson, Jr., J. H. Bigelow, for defendant.

CASWELL *v.* THE HARWOOD ELECTRIC CO.

Negligence—Contributory negligence—Safe place to work—Guy rope—Gin pole.

1. Where an employe, A, engaged with others supporting a guy rope attached to a gin pole, is warned by fellow employe, B, sent by foreman, that the position astride the rope is dangerous, B testifying that "he thought he changed his position," and A is soon thereafter projected into the air by tightening of rope, caused by fall of the gin pole, the facts as to negligent setting of pole, safe place to work, contributory negligence, etc., are for the jury, and verdict for plaintiff will not be disturbed.
2. In case, *supra*, no testimony as to position of A just before fall of pole.

*Motion for judgment n. o. v. Common Pleas, Luzerne county.
No. 1559, October term, 1914.*

O'BOYLE, J., February , 1919.—This action was instituted by Mildred Caswell, plaintiff, against The Harwood Electric Co., defendant, to recover damages, in consequence of fatal injuries received by her husband, Andrew Caswell, while in the employ of the defendant company as a laborer, January 6, 1914, through the alleged negligence of the defendant company, mainly in failing to give the deceased proper instructions as to the work he was required to do on the day in question, and also that they did not give him a reasonably safe place in which to work.

The deceased was one of a construction crew employed by the

defendant company for about a month preceding the date of his death, and that he, with others, was engaged in the erection of a high-powered electric transmission line from Harwood, Pa., connecting two of the power houses owned and operated by the defendant and certain allied interests.

The power house at Hauto was located on the south side of the dam, and they were approaching or spanning this dam from the northerly side, and had, in the course of construction, the southerly tower.

This plan of construction, on account of the season of the year, involved considerable difficulty, in order to suspend the transmission wires between and over this body of water, a distance approximately of twelve hundred feet.

The towers on the northerly and southerly side of this body of water, to which we have referred, were to be of steel construction, each consisting of three sections, the total height, when in place, being ninety-five and one-half feet, and were to rest on concrete foundations, about six feet square at the top, the bases of which were about eight feet above the water line.

The first section which was to be placed upon the concrete base on the southerly side, on the day in question, was about forty feet in height and weighed about two tons.

The means employed by the defendant company in raising the several sections into place, was a contrivance known as a gin pole, *i. e.*, an ordinary pole, which is stood up on end, and at its full height was about forty feet, and attached thereto is a pulley, with a system of ropes and guy wires, to steady the pole. The motive power employed to lift the sections was that of horses. The guy wires vary in number, according to the circumstances.

In some cases four are used, in others only three. The latter arrangement is known as a "crow-foot guy", and the three guy ropes are distributed at equal distances apart, or as nearly so as is possible, so that if the pole should lean too much in one direction it may be steadied into position by the other two.

On the day of the accident plaintiff's decedent and other members of the crew, proceeded to erect the gin pole in place, preparatory to the lifting of the first section of the tower, and according to the evidence this gin pole was operated by four guy ropes. One of the guys was fastened or tied to a pole on the breast of the dam and was about one hundred and fifty feet in length. The other was anchored by two "bull-pins" or heavy iron bars. The third, or west guy, was fastened to a pin driven in the shore, and the fourth was placed in charge of a member of the crew, named Reinmiller, and he held it from his position on the ice. It was testified to that the gin pole was placed in and upon a heap of stones.

The deceased, with two other members of the crew, was

placed in charge of the long guy rope going to the breast of the dam, and their function was to break down upon the rope, in order to steady it and take up the slack.

It appears from the testimony that a short time before the occurrence of the accident, which resulted in the death of Caswell, he was astride the rope, and that a fellow employe named Quinn was sent by the foreman to warn him that this was an improper position.

It also appears—at least from Quinn's testimony—that he "thought he changed it," and that four of them were bearing down, as instructed, on the guy rope.

A short time before the accident Quinn was called away by the foreman, which left three men, of which Caswell was one, in charge of the rope which finally caused his death.

It is contended that this result was brought about by the gin pole being negligently supported at its base, and when the effort was made to lift the heavy burden the strain upon the rope held by Reinhiller was too great for him to sustain, in view of the fact that it was not attached to any permanent object, and the gin pole having been over-balanced, was suddenly carried downward, drawing the rope which was held by Caswell and the other two, suddenly so taut that he was catapulted in the air, and when he fell upon the ice his skull was fractured, producing, as before stated, instant death.

No one, so far as the evidence reveals, saw Caswell for a period of three minutes before the fatal accident, and just what his position was at the time the pole, with its burden, fell, no one has positively stated, but it is to be assumed that after the instructions were given him he did that which he was told to do, and there is testimony in the case that he changed his position from straddling the rope to that of bearing down upon it with the others.

We are now asked, in a very learned and carefully prepared brief, to enter judgment *non obstante veredicto*, for the reasons which we have already set forth.

This case was carefully tried by counsel on both sides, and we feel that it was properly a question for the jury to determine, whether or not, under the whole of the evidence, Caswell was properly instructed, and whether he obeyed the instructions; and also, whether he had a reasonably safe place in which to work; and we are unable to reach the conclusion that the finding of the jury should be set aside, in a case which, in our judgment, was peculiarly their province to decide.

Hence, we deny the motion, and direct that judgment be entered in accordance with the verdict.

F. A. McGuigan, for plaintiff.

J. H. Bigelow, J. R. Sharpless, for defendant.

HANNON v. D. & H. Co.

Mines and Mining—Acts 1891 and 1901—Constitutionality—Responsibility for non compliance—Injured employees.

Argument of unconstitutionality as to Act 1891, holding coal mining company responsible for failure of its mine foreman in complying with Act does not hold with reference to Act 1901. In former Act mine foreman is certified officer of the State and he alone, and not the owner is made liable for non compliance with certain designated duties to employees injured. Apparent purpose of Act 1901 is to correct deficiency in Act 1891, and places responsibility for negligence of foreman directly upon mine owner or operator. Act 1901 omits designating fire boss or mine foremen, and this, together with definition of mine foreman in Art 7, Act 1901, shows that Legislature had knowledge of deficiency of Act 1891 and intended to correct it.

Defendant's motion for new trial. Common Pleas, Luzerne county. No. 788, March term, 1916.

O'BOYLE, J., March 4, 1919.—The plaintiff's husband, John Hannon, was employed by the defendant company as a miner in the Pine Ridge colliery, Miners Mills, Luzerne county, Pa. May 21, 1915, and for a long time previous, and while engaged in the line of his employment, working in a breast, and taking a skip off a pillar, in the Hillman vein of said mine, was injured about 2:30 p. m., of the day in question, by a large piece of rock which became loosened in the roof of his chamber, falling a height of ten or twelve feet, striking Hannon on his instep, practically severing the foot and causing the injury which finally resulted in his death.

The injury to the foot is not the negligence for which damages are claimed in this action, because it is conceded on both sides, that so far as this injury was concerned, it was incident to the hazardous employment in which he was engaged, and for which no recovery could be had.

The case has already been twice tried. The first trial resulted in a verdict for the plaintiff for \$6,374; and, a new trial having been granted on the ground of error in the charge of the Court as to the nature of plaintiff's cause of action, a second trial resulted in the plaintiff recovering a verdict of \$5,000.

The negligence of which the plaintiff complains, and upon which she bases her right to recover, as averred in her declaration, rests upon a two-fold cause of action. First, that her husband's death was caused by defendant's negligence in failing to supply a proper medical room, and supplies in the mine for first

aid treatment, and second, by failure to remove him promptly from the mine medical room, if one existed, to his home, or to a hospital, where skilled treatment could be administered.

The case was submitted to the jury on both branches of liability and under the general Anthracite Mine Law of 1891 and the special Act of 1901.

Section 3, Article 7, of the Act of 1891, provides as follows:

"Whenever any person or persons employed in or about a mine or colliery shall receive such injury by accident or otherwise, while so employed, as would render him or them unable to walk to his or their place of abode, the owner, operator or superintendent of such mine or colliery shall immediately cause such person or persons to be removed to his or their place of abode, or to an hospital, as the case may require."

The Act of 1901 provides:

"That within six (6) months after the passage of this Act, it shall be unlawful to operate any anthracite mine, employing ten men or more, in the State of Pennsylvania, unless said mine is provided with a sufficient quantity of linseed or olive oil, bandages, linen, splints, woolen and waterproof blankets.

"Said articles shall be stored in a room erected at a convenient place in the mine, which room shall not be less than eight by twelve feet, and sufficiently furnished, lighted, clean and ventilated, so that therein medical treatment may be given injured employes in case of emergency. * * *

"It shall be the duty of the mine foreman or his assistants, in case of injury to any employe * * * by any cause while said miners are at work in said mines, to at once visit the scene of accident, see that the injured is carefully wrapped in woolen blankets, and removed to the "medical room", and so treated with oils or other remedies as will add to the comfort and care of the patient.

"After being treated with all the skill known to the foreman or his assistants, the injured person shall be carefully wrapped up and sent to the surface, to be taken home in an ambulance or to the mining hospital, as may be desired, without expense to the injured party.

"Where accident to any employe involves injury to limbs or causes loss of blood, the foreman or his assistants shall see that the bandages, splints, and linen shall be applied where necessary

to prevent loss of blood and relieve pain. The foreman shall, in all cases, see that the injured person is sent to the surface without delay."

The only serious question presented in the argument of the case, on both sides, was the question involving the constitutionality of the Act of 1901, in so far as an attempt is made to hold the company liable for the failure of the mine foreman to comply with the provisions of the Act.

The argument and efforts of defendant's counsel were based on an attempt to parallel the case at bar with the *Durkin v. Kingston Coal Company* case, 171 Pa., page 193, and the cases afterwards decided along the same line, which exempt the mine owner from liability, for the reasons that the mine foreman, under the Anthracite Mine Law of 1891, is a certified officer of the State, and also a fellow-servant of the employes of the mine, and that, therefore, the negligence here complained of, being the negligence of the mine foreman, he alone, and not the owner or operator, is responsible for any negligence or inattention subsequent to the injury which resulted in the death of the deceased.

Plaintiff's counsel contend that the certified mine foreman, or officer of the State, was passed upon in the *Durkin v. Kingston Coal Co.* case, is not the officer or foreman contemplated in Section 6, of the Act of 1901, for the reason this Act provides, and differently classifies, those having such duties to perform, as are involved in this case, and those duties which were involved under the general Anthracite Mine Law of 1891, in that it omits from this Act of 1901, any reference to mine foremen or fire bosses, so far as liability for injury done through their negligence, is concerned, and places at once the burden or obligation of performance of these duties upon owners, operators, or superintendent. The language of the section of the Act being as follows:

"That for any injury to employes occasioned by any violation of the Act or any failure to comply with its provisions, by the owners, operators or superintendent of any coal mine or colliery, a right of action shall accrue to the party injured against said owner, operator, etc."

And further, it is contended, that as applicable to the case at bar, the contention advanced by defendant does not raise the whole question involved in this action, for the reason that it is also charged that it was the duty of the defendant company—not

alone under the Act of 1901, but also under the Act of 1891—to promptly remove Hannon from the mine or hospital therein, when he was so badly injured as to be unable to walk to his home or to a hospital, and that under the circumstances of the case it was the duty of the Court to submit the question to the jury, first, as to whether there was a proper medical room in the mines, and second, if so, whether those in charge of the medical room, in behalf of the owners and operators, as mine foremen or agents, to whom this duty was delegated by the owner or operator, exercised due diligence and care in removing the injured person promptly to the head of the shaft, in order that he might be conveyed to his home, or to an hospital, as the case might require.

The particular error with which we are charged is found in the tenth reason, in failing to affirm defendant's ninth point, which reads as follows:

"Section 6 of the Act of May 29, 1901, P. L. 342, in so far as it imposes liability on the mine owner for the failure of the Mine foreman to comply with the provisions of the Act, is unconstitutional and void."

By examining the Acts of 1901 and 1891, it will be observed that there is a distinction, in that the Act of 1901 gives a cause of action for violation by any owners, operators or superintendent, and that the words "mine foreman" are not included. In this respect it differs from Section 8, Article 17, of the Act of 1891, which was declared unconstitutional, in the Durkin case, which Act gave a cause of action for any violation, by any owner, operator, superintendent, mine foreman or a fire boss, of any coal mine or colliery.

Section 3 of the Act of 1901, provides, that where the accident causes loss of blood, "the foreman shall, in all cases, see that the injured person is sent to the surface without delay."

In Section 7 the term "mine foreman", as used in the Act, is defined as follows:

"The term 'mine foreman' means the person who shall have, on behalf of the operators, immediate supervision of a coal mine."

The language of Section 6, giving the cause of action, omitting the words "mine foreman" or "fire boss" used in Section 8, Article 17, of the Act of 1891 (declared unconstitutional in the Durkin case), and the definition of 'mine foreman' used in Section 7 of the Act of 1901, show clearly, that the Legislature, with a knowl-

edge of the infirmities of the Act of 1891, intended to impose liability for non-compliance with the Act on the operator himself, and that the mine foreman, in relation to the duty of prompt removal, stands as the representative of the operator. By the use of the language "mine foreman", the Legislature obviously intended that the operator could not escape personal liability, if he had delegated the duty imposed upon him by the Act, to one designated as "mine foreman." * * *

The Act of 1891, having been declared unconstitutional, so far as liability on the part of the owner and operator of the mine was concerned, for the negligence or inefficiency of the State's representative, it is but fair to presume that the Legislature had in view a purpose to remedy a defect in the law of 1891, when they passed the Act of 1901, and inserted therein Section 6, which reads as follows:

"That for any injury to employes, occasioned by any violation of the Act, or any failure to comply with its provisions, by any owners, operators or superintendent, of any coal mine or colliery, a right of action shall accrue to the party injured against said owner or operator," etc.

This language of Section 6 of the Act of 1901, giving the cause of action, omitting the words "mine foreman" or "fire boss" used in Section 8, Article 17, Act of 1891, declared unconstitutional in the Durkin case, with the definition of "mine foreman" used in Section 7 of the Act of 1901, shows that the Legislature intended to impose responsibility of compliance with the Act, on the operator himself, and that the mine foreman, in relation to the duty of prompt removal, stands in the shoes of the operator. It is a well known fact that corporations must act through their representatives, no matter by what name they may designate them, to discharge obligations with relation to the duties imposed by Acts of Assembly, relating to the removal of men injured, to and from medical rooms in the mine, and that for their negligence, the owner or the operator becomes responsible.

If these Acts were to be construed otherwise, there would be no purpose in their passage; and, because a mine foreman, or his assistants have been designated to give the treatment in the medical room, and to oversee the injured person's removal therefrom, the owner, operator or superintendent, designated by the law as the person or persons, upon whom this burden is placed, would, in every instance, escape liability, no matter how flagrant the negligence might be.

We cannot give such a limited construction to Acts of Assembly designed for the preservation of life, and the prevention of pain and suffering.

If we should hold that Lippincott, who was the mine foreman on the day in question, is responsible, and not the company, then the operator had no representative, as required under the Act, at the scene, either to treat the injured man in the medical room, nor did the company have any representative, as required by the law, to see that the injured man was promptly or immediately removed, as required by the Act.

We are of the opinion that this work could be delegated to one designated as a foreman, or mine foreman, with responsibility for negligence of the agent or representative still upon the operator, and without violating the rule of law, or being in any way in conflict with the doctrine laid down by the Supreme Court in the Durkin case.

The Act of 1901 makes no reference to, or mention of, such an officer as a "certified mine foreman". The only officials mentioned in that Act are "mine foreman" or "foremen"; and the official whose status was passed upon and adjudicated in the case of *Durkin v. Kingston Coal Company*, is a "certified mine foreman", who is a representative of the State.

If the defendant's contention be correct, that Lippincott, who had charge of defendant's Pine Ridge mine on the day of Hannon's injury, was a "certified mine foreman"—that is to say, if he had charge of said mine, not on behalf of the operator, but on behalf of the State, as the Durkin case decides, then there was no such foreman there on that day, as would answer the definition of "mine foreman" contained in Section 7 of the Act of 1901, viz.: the person having "on behalf of the operator" supervision of said mine. And if, on the other hand, the defendant elected to regard Lippincott as the kind of foreman defined by the Act of 1901, defendant's counsel must adopt him, not as a "certified mine foreman," described in Article 8 of the Act of 1891, whose status and character are fixed by the Durkin decision, but rather as the "foreman" defined in the Act of 1901, having supervision of said mine "on behalf of the operator".

We are unable to see, whichever position is taken by the defendant, how they can escape liability for failure to remove the injured promptly, as that question was involved in the case, and submitted to the jury.

In either view, the operator himself is chargeable with the duty to remove, and with negligence for failure to do so. We have concluded to deny the motion in arrest of judgment, and for a new trial, and direct the prothonotary to enter judgment in accordance with the verdict of the jury. Rule discharged.

T. F. Farrell, H. L. Freeman, for plaintiff.
Paul Bedford, F. A. McGuigan, for defendant.

DEHAUT *et al. v. GIBBONS.**Interpleader—Articles claimed by wife—Title.*

After execution against husband, and rule for interpleader, the wife claiming certain articles, her testimony "I bought it," "my husband did not own it," is far short of establishing her title. She must prove that her purchase was with funds not furnished by the husband.

Rule for sheriff's interpleader. Common Pleas, Luserne county. No. 530, March term, 1918.

FULLER, P. J., May 9, 1918.—The plaintiffs, claimants, are respectively wife and son of the defendant in the execution, each claiming separate articles.

As to those claimed by the son, the execution creditor agrees that they may be released from the levy.

As to those claimed by the wife, she has failed to show *prima facie* ownership good against the husband's creditor or submissible to a jury.

She testifies in substance concerning the property: "It belongs to me;" "I bought it"; "I got it", naming several sources; "my husband don't own it"; but she fails entirely to make clear that payment was made with her own funds.

Most of the articles were bought upon an instalment lease, twenty-five dollars being paid down, which she "brought from Germany", the balance of about two hundred dollars being payable on the credit of her husband, in whose name the lease was signed. The rest of the money was derived from the earnings of minor children, and, of course, belonged to the father, defendant in the execution.

Such a showing falls far short of the requirements as defined, for example, in *Taylor v. Paul*, 6 Superior, at page 500, *viz.*:

"In case of a purchase after marriage the burden is upon her to prove distinctly that she paid for it with funds which were not furnished by her husband. Unless rigid proof of her title is always required, no one can calculate the amount of injustice which the Act of 1848 will produce: *Gamber v. Gamber*, 18 Pa. 363. 'Evidence that she purchased it amounts to nothing unless it be accompanied by clear and full proof that she paid for it with her own funds. In the absence of such proof the presumption is a violent one that her husband furnished the means of payment.' *Keeney v. Good*, 21 Pa. 349; *Rhoads v. Gordon*, 38 Pa. 277; *Wilson v. Silkman*, 97 Pa. 509; *Aurand v. Schaffer*, 43 Pa. 363. She

must prove her title 'by clear and satisfactory evidence.' *Hoar v. Axe*, 22 Pa. 381. 'She must make it clearly appear that the means of acquisition were her own, independently of her husband.' *Auble's Admr. v. Mason*, 35 Pa. 261."

Accordingly the rule for interpleader is discharged, with release from the levy of the articles claimed by the son.

M. H. Salsburg, for claimants.

John McGahren, for execution creditor.

VEDERMAN *v.* C. R. R. OF N. J.

*Practice—Process—Service—Registered foreign corporation—
Acts 1851, 1901, 1903 and 1911.*

1. Service of process on a registered foreign corporation should be made—Act June 8, 1911, P. L. 711—upon the secretary of the Commonwealth.
2. Service Act 1901, providing that service may be made upon a corporation by handing an attested copy at any of its offices, etc., does not apply to registered foreign corporations, for said Act provides for such service upon the duly registered attorney.
3. Act 1911 holds that process *may* still be issued outside the county in which corporation has its principal place of business, but it does not hold that such process *may* be served otherwise than on the duly designated attorney by sheriff of Dauphin county.

Certiorari. Common Pleas, Luzerne county. No. 590, March term, 1918.

FULLER, P. J., May 12, 1918.—The action is assumpsit by a consignee for breach of common carrier's contract to carry certain merchandise from Philadelphia to Scranton, in Lackawanna county, and defendant suffered judgment by default.

The defendant is a registered foreign corporation operating a railroad partially located in this county, in which it does not have its principal place of business and in which as above indicated, the right of action did not arise, but in which it does maintain a depot and a clerk in charge thereof and transacts business.

The exceptions attack only the service of the summons as returned by the constable, thus:

"Served the within writ February 18, 1918, upon the within named defendant Company, the Central Railroad Company of New Jersey, incorporated, by handing to A. D. Petrey, their clerk in charge of their depot in Wilkes-Barre, county and State aforesaid, he being a clerk and the person in charge thereof, a true and attested copy of the within summons. I being unable

upon inquiry thereat to ascertain the residence of one of the said officers of defendant company within the county."

The defendant contends that such service contravenes the Act of June 8, 1911, P. L. 711, entitled "An Act to regulate the doing of business in this Commonwealth by foreign corporations, the registration thereof, and service of process thereon, etc.", which provides, in Section 2, "every such foreign corporation before doing any business in this Commonwealth shall appoint in writing the secretary of the Commonwealth and his successors in office, to be its true and lawful attorney and authorized agent, upon whom all lawful processes in any action or proceeding against it may be served. * * * The power of attorney shall be executed with the seal of the corporation and signed by the president and secretary thereof and shall contain a statement showing the title and purpose of said corporation, the location of its principal place of business in the Commonwealth and the post office address within the Commonwealth to which the secretary of the Commonwealth shall send by mail any process against it served on him. * * * Service of such process shall be made by the sheriff of Dauphin county by leaving two copies of the process and a fee of two dollars at the office of the secretary of the Commonwealth, and he shall make due return of his service of said process to the Court, magistrate or justice of the peace issuing the same; such process may be issued by any Court, or magistrate, or justice of the peace having jurisdiction of the subject matter in controversy, in any county of the Commonwealth in which said corporation shall have its principal place of business or in such county in which the right of action arose, etc."

The defendant has fully complied with the requirements of the Act and should enjoy its protection by service of process in the prescribed manner upon the secretary of the Commonwealth, unless the service in this case can be sustained as the plaintiff contends, by the Act of April 8, 1851, P. L. 353, or by the Service Act of July 9, 1901, P. L. 614, and supplement thereto of April 3, 1903, P. L. 139.

The said Act of 1851 provides: "That in any case when any insurance company or other corporation shall have an agency or transact any business in any county of this Commonwealth, it shall and may be lawful to institute and commence an action against such insurance company or other corporation in such county, and the original writ may be served upon the president, cashier, agent, chief or any other clerk, or upon any directors or agent of such company or corporation within such county, and such service shall be good and valid to all intents and purposes."

This, as will be observed, not only confers jurisdiction upon the courts of the county where the corporation has an agency or transacts any business, but also provides the manner of service,

which was pursued in the present case, and the plaintiff contends that on the authority of *Kline v. Maryland Railway Company*, 253 Pa. 204, the Act of 1911 has not repealed the Act of 1851, nor affected the validity of such service.

An examination of that case, however, clearly shows that it merely decided a question of county jurisdiction and not a question of service at all, for the latter was expressly conceded to be defective.

Said the Supreme Court: "The question to be determined is: Do the courts of a county where a summons in trespass for personal injuries is issued, have jurisdiction against a duly registered foreign corporation if its business headquarters are located and the cause of action arose in another county, the defendant having an office, depot and place of business in the first county and its railroad being located and operated in both?"

The Court held that the provision in the Act of 1911, "such process *may* be served" was not mandatory, and therefore that the action might still be brought under the prior legislation in any county where the corporation has an agency or transacts any business, but the Court does not hold that the manner of service was regular, because that question was not involved. It holds that process may still be issued outside of the county in which the corporation has its principal place of business, or in which the right of action arose, but it does not hold that such process wherever issued, may be served otherwise than upon the duly designated attorney by the sheriff of Dauphin county.

The Service Act of 1901, and its supplement of 1903, provides, *inter alia*, that service may be made by the sheriff upon a corporation "(e) by handing an attested copy thereof at any of its offices, depots or places of business to its agents or persons for the time being in charge thereof, if upon inquiry thereat the residence of one of said officers within the county is not ascertained or if from any cause an attempt to serve at the residence given has failed."

This language was adopted in the return by the constable in this case, but it does not sustain the service, first, because he has not specified *what* officers, and, second, because that manner of service does not apply to registered foreign corporations, for said Acts expressly provide that service be made upon those corporations "by serving the duly registered attorney, etc", which manner has been uniformly held to be exclusive (*Liblong v. Kansas Fire Insurance Company*, 82 Pa. 433, and others).

We conclude that the summons in this case should have been served upon the secretary of the Commonwealth, and that the exceptions therefore should be sustained.

Judgment reversed.

M. H. Salsburg, for plaintiff.
Arthur Hillman, for defendant.

IN RE LUNACY OF EDWARDS.

Lunacy—Committee—Surcharge of—Responsibility joint and several.

1. **Where** surcharge has been decreed against committee in lunacy, a man and a married woman, they are jointly and severally liable for the surcharge and for interest thereon, and where the man, after imprisonment for contempt in not paying, is released on payment of the surcharge, with notification that it is not received in satisfaction and that interest will be demanded, he cannot escape responsibility on the claim that his payment of the surcharge amounts to more than an equal division of surcharge and interest.
2. On prolonged failure of payment by the other, rule for attachment will be granted with restriction to amount of interest, and without issuance until her liability as married woman, to arrest in the circumstances, is determined.
 1. *Rule on Alexander Davis and Edith Davis Burdon, committee, to show cause why attachment shall not be issued for non-payment of surcharge.* 2. *Rule on same to show cause why they shall not pay interest on surcharge.* Common Pleas, Luzerne County. No. 310, February term, 1902.

FULLER, P. J., January, 1919.—By our decree filed May 3, 1909, we fixed the final surcharge against the committee on settlement of their account at \$150, to be paid within sixty days, that is, before July 3, 1909, and no exceptions were ever taken to the decree, which therefore became unimpeachable except by matters subsequent.

Nevertheless the committee utterly ignoring the decree and demand for payment, did not pay or offer to pay the amount of the surcharge or any portion thereof.

Consequently, on May 29, 1918, the victim, on petition averring these facts, obtained rule to show cause why an attachment should not be issued for non-payment of surcharge, returnable June 13.

To said rule one member of the committee, Alexander Davis, made no answer, but the other member, Edith Davis Burdon, made an answer averring certain matters hereinafter mentioned.

Thereupon the Court, on June 14, 1918, made the rule absolute against Alexander Davis and directed issuance of attachment forthwith, but continued for further hearing the rule as against Edith Davis Burdon.

Upon the attachment against Alexander Davis, he was brought into court June 15, 1918, and committed to jail for contempt, but was released from custody June 17, 1918, by order of Court on payment of \$150, with the costs of the writ.

On October 5, 1918, the victim, on further petition averring that no interest had been paid on the surcharge of \$150, although her attorney, before the release of said Davis from custody, had "given notice that he demanded interest on said amount from July 3, 1909", obtained another rule on both to show cause why they should not pay interest.

To this rule Alexander Davis made answer by the suggestion that in paying \$150 on the attachment he had exceeded his just share of the whole demand, with interest, as between himself and Edith Davis Burdon, who therefore should alone be held for the claim of interest; and Edith Davis Burdon, referring to her former answer, made further answer by the suggestion that in receiving the \$150 on the attachment the victim had received satisfaction of her entire claim and had exhausted her remedies for its collection.

The case comes before us now entirely upon the pleadings, without evidence, viz., as against Edith Davis Burdon, upon both petitions and both of her answers thereto; as against Alexander Davis, upon the last petition and his answer thereto; and our conclusions therefrom will be briefly stated.

1. The answer of Alexander Davis shows no legal ground against the payment of interest.

Both members of the committee were jointly and severally liable for the whole amount of the surcharge with interest, and if one pays more than the equal share as between the two, the equity might perhaps be enforced against the other, but not against the victim.

Alexander Davis was liable to pay \$150, with interest from July 3, 1909, and after default for nine years paid only the principal without the interest, which is still unpaid.

To absolve him now from payment of interest would be a shocking act of injustice.

2. The answers of Edith Davis Burdon likewise show no legal ground against either rule, unless the fact of her being a married woman should on the first rule be held to absolve her from arrest on attachment.

In her first answer she avers nothing except matters antecedent to the surcharge in 1909, and these of course cannot be considered.

In her second answer she rests entirely upon the untenable legal proposition that the payment of \$150 by Alexander Davis on the attachment operated as a complete satisfaction of the claim.

It cannot be so regarded, for it only operated by the grace of the Court to release him from custody on the ground of contempt, and the money was not received in satisfaction, but its receipt was accompanied by notice that interest would still be

demanded, as set forth in the uncontradicted averment of the victim's second petition.

3. The rule for interest on the second petition as against Edith Davis Burdon is made absolute, and the rule against her for attachment on the first petition is likewise made absolute with restriction, however, to the amount of interest, and without issuance until the question of her liability as a married woman to arrest under the circumstances shall have been argued and submitted.

4. The rule for interest on the second petition as against Alexander Davis, is made absolute, but it must be observed that this order standing alone, while it establishes his liability for the interest, does not of itself authorize the granting of an attachment.

W. J. Goeckel, for rules.

W. C. Price, for Edith Davis Burdon.

W. H. Gillespie, for Alexander Davis.

THEIS v. THEIS.

Husband and wife—Divorce—Alimony—Husband's net income—Wife preferred to creditors.

1. Where husband, respondent in divorce proceedings, resists payment of alimony on ground that his gross income from business, rents, etc., is exhausted by taxes and interest bearing liabilities, the wife will be preferred to creditors, and alimony proportionate to claims of dependent children will be decreed, and where creditors could take property, which exceeds liabilities, and leave to respondent a business yielding fair net income.
2. If wife were living with husband he would be bound to support her, and exigency of her living apart, pending trial of charges against him, does not prejudice her right to support.

Divorce. Rule for alimony and counsel fees. Common Pleas, Lueerne county. No. 391, October term, 1918.

FULLER, P. J., February, 1919.—The alleged ground of divorce is cruel and barbarous treatment compelling withdrawal of libellant wife from home of respondent husband on July 10, 1918.

The rule is resisted on the ground of his poverty.

He owns real and personal assets worth \$125,000.

But he owes interest bearing liabilities which counter-balance the assets.

His gross income amounts to \$10,262, composed of these items:

Rents,	\$ 4,229.00
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Dividends,	733.00
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Profits from theatre,	2,500.00
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Net earnings in business of insurance agency,....	2,800.00
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	\$10,262.00
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His net income from these sources, after claimed deduction of \$3300 from rents on account of taxes, etc., is \$6,962.

The annual interest on his liabilities amounts to \$7,024.50.

A bookkeeper's deficit is thus disclosed of \$62.50 between his net income and the interest.

All of the foregoing figures are furnished by himself without challenge or other evidence submitted.

He is forty-five years of age.

Four children, the fruit of the union, aged respectively from five to sixteen years, reside with him.

The libellant has no property, livelihood, or income from any source whatever.

Thus we are confronted with a very disgusting dilemma.

If respondent does not pay the interest, he may lose his property, and therewith all income except the item of \$2800 earned in the insurance business.

On the other hand, if he pays the interest, he cannot pay alimony.

The case therefore resolves itself into a choice between the wife and the creditors.

If he pays her, he cannot pay them.

If he pays them, he cannot pay her.

We feel constrained to hold that she must be preferred.

If the creditors are dissatisfied with the result, let them take the property, which counter-balances the liabilities, leaving him the business, which yields at least an average income.

If she were living with him, he would be both able and in duty bound to provide for her maintenance, and neither his ability nor his duty is affected, in fact or in law, by the circumstance that under the exigency of alleged ground for divorce she is living apart.

Assuming an income of \$2800, with six persons dependent, we would say that on a reasonable division, one-sixth of this income, amounting to approximately forty dollars a month, should be paid to the libellant, subject to such increase or decrease as may be measured by later developments.

We also find that counsel fees of fifty dollars should be presently paid, subject to later addition if deemed proper.

Accordingly the rule is made absolute, with decree (1) that until further direction the respondent pay to the libellant, as alimony, \$40 per month, making good all arrears, etc.; (2) that the respondent also pay to libellant a present counsel fee of \$50, subject to later addition if deemed proper.

John McGahren, for libellant.
J. T. Lenahan, for respondent.

IN RE HABEAS CORPUS VOGT.

Husband and wife—Arrest for non-support—Process issuing in another county—“Backing”.

A warrant issued by wife against her husband for non-support may be issued in a county other than that in which the husband resides, but the arrest in the county where the husband is found may not be made until the warrant is backed by an alderman or justice of the peace in that county.

Common Pleas, Luzerne county. No. 261, March term, 1918.

STRAUSS, J., March 19, 1919.—This writ was directed to August Stry, a constable of Luzerne county, who had arrested Peter Vogt by virtue of a warrant issued at Millersburg, in Dauphin county, by Charles A. Miller, justice of the peace, upon a charge that he does not provide for his wife, Irene G. Vogt, and her children.

It was averred by the defendant that his residence was in Luzerne county, where he lived with his wife and her children until October 24, 1918, when she, without cause, left his home in Hanover township, in this county, and returned to the home of her mother at Millersburg, where she instituted this proceeding. It is argued that the circumstances presented a clear case of the institution of the proceeding “at a distance from the county where the defendant resides for the purpose of persecution or annoyance, and that, therefore, the action was not *bona fide* and within the spirit and meaning of the law;” and that because this quotation is of language found in *Com. v. Tragler*, 4 Superior, 163, this court would have the power to investigate the *bona fides* of the charge of non-support and to release from custody this defendant, if his allegations were substantiated.

After examination, however, of *DeMott v. Com.*, 64 Pa. 302; *Kellar v. Com.*, 71 Pa. 413, and *Com. v. Tragle*, *supra*, we have no doubt of the legal right on the part of the wife to swear out a warrant in Dauphin county. It is that court which is required by *Com. v. Tragle* to investigate the *bona fides* of the proceedings in Dauphin county.

There is another reason, though, which compels us to discharge this defendant from the custody of the constable at this time. Under Section 4, Act April 13, 1867, the arrest upon this warrant issued in Dauphin county may not be made by the constable to whom the warrant was addressed until he shall have it “backed by any alderman or justice of the peace of the county in which”

the defendant may be found in the manner provided in Section 3 of the Act March 31, 1860. (See 1 Pur. Dig., p. 1221, pl. 12). It appears that the warrant has not been "backed".

On behalf of the Commonwealth it was contended that the backing of the warrant is not necessary since the Act of May 2, 1899, P. L. 173, but that Act relates only to criminal matters. A proceeding to compel support of his wife and children by a husband or father, is not criminal, but is still regulated by the Act of 1867. (See cases above cited.)

Now, February 22, 1919, defendant is discharged from custody, because the warrant in pursuance of which he was arrested having been issued in Dauphin county had not prior to his arrest been backed as required by law in Luzerne county.

HARRIS *et al. v.* LEHIGH VALLEY COAL CO.

Arbitration—Time limit—Revocation.

1. Where litigants desire speedy adjudication, as evidenced by agreement to appoint arbitrators within thirty days and award to follow in sixty days from appointment, and arbitrators fail to make award in the period, and three years passes, one arbitrator then explaining that the arbitration would be unavailing lacking proper definition of the property (coal lands), and one arbitrator dies and U. S. court judge who made appointment of third arbitrator has returned to private practice, and no further action for several years, the arbitration should be revoked.
2. Judge above was presumably to act both from his official status and from personal qualities. Status having been changed as to official position, he cannot after long lapse, as noted, name arbitrator to take place of the one deceased, nor could his successor on the bench do so.

Rule why the original rule in this case for arbitration shall not be set aside and submission annulled. Common Pleas, Luzerne county, No. 111, October term, 1909.

STRAUSS, J., December 23, 1918.—This controversy arises upon a coal lease which imposes an obligation to pay minimum royalty until the exhaustion of the coal. Litigation having ensued or being threatened, an agreement was entered into on March 9, 1908, whereby among other questions, whether the coal had been exhausted was to be submitted to referees, one appointed by each party, with power in the referees thus appointed to select a third, a mining engineer, and with further provision that "if the two referees chosen by the parties shall fail to agree upon the selec-

tion of the third for a period of thirty days immediately following the first day of March, 1909, then, and in that case Judge R. W. Archbald, of the United States District Court for the Middle District of Pennsylvania, shall immediately, upon the application of any of the parties, appoint the third, and the three referees shall then make the estimate and report thereon within the next sixty days thereafter, or be subject to such penalties for failure to report as the said judge may impose." Judge Archbald in due course appointed the third referee.

The referees failed to arrive at an award within the time fixed by the agreement. On February 25, 1911, Thomas M. Righter, the referee appointed by Judge Archbald, wrote a letter explaining that "until the parties agreed upon the exact location of the land covered by the lease, and of the area of the coal in the upper vein, it would hardly be advisable to take up the question to be submitted to the arbitrators." No further effort was made to arrive at an award. Righter has since died, while Judge Archbald is no longer judge in the above named Federal Court.

The plaintiffs have taken this rule and the defendant concedes that the death of Righter will be sufficient ground for revoking the arbitration unless "the machinery provided for his appointment is sufficient to enable Judge Archbald, or Judge Archbald's successor as judge of the United States District Court, to fill the vacancy on the board occasioned by Righter's death."

It is argued on behalf of defendant that "the delegation of power to Judge R. W. Archbald of the United States District Court was a delegation of power to him either as an individual or by reason of his office. It must be one thing or the other. If it be construed as a power to him as an individual and the added words are construed merely as words of identification, then he might well act whether at the time of acting he was or was not a judge of the United States District Court. If, on the other hand, it be construed that the power given to him was by reason of his office, then the power might well be exercised by one occupying that office * * * In either case there would be somebody in existence who might well exercise the power."

We cannot agree that either horn of the dilemma must be taken. In our opinion the power of appointment was conferred upon Judge Archbald personally, to be exercised while judge, and it required the combination of both elements—his personality and

his incumbency in the office of judge of that particular court in order to authorize an appointment. The weight given by the parties to his judicial station is indicated in the clause of the agreement which requires the referees' report "within the next sixty days thereafter or be subject to such penalty for failure to report as the said judge may impose." Undoubtedly his personality must have had potent influence in bringing the parties together in choosing him, and undoubtedly, also, his official relation to the public as a judge of the court had its influence. Now that he no longer holds the position but is in the active practice of his profession as a lawyer, the conditions existing that led to his personal selection have entirely changed. Neither can it be assumed that the parties would have agreed upon his successor as the person to make the appointment. The selection of Judge Archbald was personal, but limited to the period of his incumbency in the office.

But there is another reason which seems to us quite as convincing that the vacancy cannot now be filled either by Judge Archbald or by his successor.

The agreement required him to appoint the third referee immediately on the application of any of the parties if the two referees failed to agree on the selection of a third within thirty days after March 1, 1909, and required the three referees to come to a decision to report it within the next sixty days thereafter. Judge Archbald appointed Righter on February 4, 1911. The referees did not make their estimate and report thereon within the time limit, and there is no provision in the agreement permitting a second application to Judge Archbald, certainly none justifying such an application after the expiration of the time within which the referees were to report.

In this respect the case is analogous to *Johnson v. Crawford*, 212 Pa. 502, where Judge Mestrezat considers most if not all the relevant decisions in Pennsylvania besides many text-book authorities. We shall not encumber this opinion with quotations from that case but are of opinion that the final statement in it is perfectly applicable here:

"The parties in this case desired a speedy disposition of the controversy, and the manifest purpose was that a failure of the arbitrators to act within the time fixed in the submission should be a revocation of their authority."

Rule granted, is made absolute, and the submission to arbitrate is annulled and struck off.

F. M. Lynch, J. T. Lenahan, for plaintiff.
F. W. Wheaton, for defendant.

WYNNE v. L. & W. V. R. R. Co.

Non pros.—Abandonment—Presumption of.

1. Bare lapse of two years from filing suit, to statement does not predicate abandonment, as where statement is filed in two years and three months and subsequently negotiations for settlement, illness of plaintiff's wife, etc., are disclosed.
2. Court Rule XLIII is only designed to establish extraneous matters of fact averred in petition for *non pros*, and not specifically denied by counter affidavit.

Rule to show cause why non pros. shall not be entered. Common Pleas, Luzerne county. No. 714, June term, 1916.

FULLER, P. J., December , 1918.—This action of trespass was brought June 14, 1916, and no further step was taken until September 25, 1918, when plaintiff filed statement showing cause of action to be personal injury sustained as a passenger on defendant's railroad, for which cause the statutory limitation would be two years.

The statement avers as the date of accident June 14, 1916, the very date of bringing suit, which, if correct, and we have nothing before us to show the contrary, indicates a spirit of promptness quite inconsistent with that spirit of procrastination which lays ground for a *non pros*.

The petition for this rule was filed October 7, 1918, after filing of statement, and avers no grounds whatever extraneous to the record, not even containing an allegation of abandonment, but explicitly suggests as the sole ground of *non pros*, "the failure of defendant to file his declaration within two years after suit instituted," the motion being thus based strictly upon the analogy of the statute of limitations.

Upon argument of the rule, when it was first set down upon the list January 9, 1919, the plaintiff filed an answer averring extraneous facts, which, if true, fully explained any appearance of procrastination, viz., negotiations for settlement, and sickness of plaintiff's wife, coupled with the suggestion of a belated trial list.

The defendant objects to the answer on the ground of its not being filed within fifteen days after service, October 9, 1918, of the petition and rule, as provided in Court Rule XLIII (2); but the latter is only designed to establish extraneous matters of fact averred in the petition and not specifically denied by counter-affidavit, within the period named, and does not apply where as here no such extraneous matters of fact are averred in the petition.

Be this as it may, we base our decision in this case, as in some other cases, distinctly upon the proposition that the lapse of barely two years does not afford sufficient ground for presuming abandonment on the state of this record.

Therefore the rule is discharged.

W. L. Pace, for plaintiff.

J. T. Lenahan, for defendant.

BOLIN *et al.* v. SUSQUEHANNA COAL CO.*Contract—Breach—Coal lands—Damages—Statement.*

1. Where A sues B, coal corporation, for damages for breach of contract, B having given permission to A to enter upon coal lands to prove for coal, with agreement for lease in event of coal being found, and B during proving process conveys tract to C, A having reported progress at intervals, and B's representatives having access to operations, A reporting 500,000 tons of coal and demanding lease, and being refused, A's expenses may be recovered, B having refused opportunity to carry out the contract.
2. Other damages, such as loss of bargain—difference between market value of coal in place and royalty as fixed in lease proposition, increase in value of land through plaintiff's discovery of coal, etc., cannot properly be estimated in lump sum, but must be separately and particularly set forth.

Affidavit of defense and exceptions. Common Pleas Luzerne county. No. 447, March term, 1918.

STRAUSS, J., January 8, 1919.—This is an action of assumpsit. The plaintiffs' claim that as a result of correspondence and the acceptance by plaintiffs of propositions contained in letters written by or on behalf of the defendant (copies of which have been attached to the statement) a contract arose for the breach of which this action has been brought. As some of the averments of the statement charge fraud and sound in tort, perhaps the plaintiff might have elected to bring an action of trespass at least for the damages resulting after particular representations were made. This tort, however, may be waived and is waived in the present action. Whether the inclusion of averments of this character will have the effect to modify the rule as to the measure of damages, is not necessarily involved as a question of pleadings and may be postponed for consideration at the trial.

The contract, it is averred, granted permission to the plaintiffs to enter upon defendant's lands in Hazle township for the purpose of proving them for coal, a right which was to continue during one year, and if plaintiffs found coal in sufficient quantities for mining operations to warrant a lease, the defendant would lease the lands to the plaintiff for a term at a price stated in the correspondence. It is averred that the period during which the plaintiffs might continue to prove for coal was extended first for one year from February, 1913, and later for another year; and it is averred that by the writings the plaintiffs had the privilege to continue to prove for coal for such additional time as would be required until they were given sixty days' notice by

the defendants to quit proving and to surrender possession of the property; that the plaintiffs discovered coal (about 500,000 tons or more) in sufficient quantities and were ready to take a lease upon the terms set out in the letters, but that the defendant refused to perform its part of the contract by making the lease, and, in fact, had put it beyond its power to perform the contract, because it sold the land in February, 1914, to the Manor Real Estate Company. The plaintiffs therefore claim damages, \$100,000, based upon: (1) expenditures of approximately \$21,315; (2) the difference between the market value of the coal in place and the royalty value as fixed in the propositions for a lease; (3) the loss of the bargain; and (4) increase of the value in said land through demonstration by plaintiffs of the presence of coal in paying quantities.

The plaintiffs' statement is sub-divided into twenty-two paragraphs and has attached to it copies of letters referred to in the statement, and also an addendum which seems to have been intended as an itemization of the "expenses incurred by plaintiffs * * * from the first day of March, 1912, until the first of May, 1915, consisting of one hoisting engine, six hundred feet of rope, one car," and twenty-seven other articles or acts which we shall not here enumerate, "totaling \$21,315," but no separate value is given in this addendum for any one item.

The defendant has filed an affidavit of defense which raises only questions of law. This charges the insufficiency of the statement because:

1. It does not set out a complete cause of action in "clear, precise and unequivocal language which will admit of specific answer."

2. There is no specific statement of particular damage sustained as a result of the alleged breach of contract, because the statement is not precise and definite as to damages in that it does not give:

(a) The precise location and acreage of the land on which the work is averred to have been done;

(b) The exact value of the land or of the coal in place before and after the improvements and breach of contract;

(c) The exact royalty value as compared with the royalty at which the lease was to be made;

(d) The mineable tonnage on which the damage is claimed;

(e) The facts or data by which the damages may be ascertained or assessed and a judgment may be liquidated;

(f) The distribution of the lump damage averred as \$100,000 among the several items set out as elements of damage but fails to define the exact amount claimed under each head.

3. The plaintiffs are in no event entitled to any damage predicated on expenses, labor and outlay in proving for coal.

Taking up the first question raised by the affidavit of defense, we are of the opinion that the statement sets out a cause of action in sufficient language to require an answer. The letter dated February 20, 1912, being the first in the series appended to the statement undoubtedly extended to the plaintiffs a privilege to enter upon the defendant's land in Hazle township for the purpose of proving for coal on condition that they should pursue the work with due diligence and at their own expense within one year. "If at the end of that time you find coal in sufficient quantities," the letter proceeds, "we will be willing to give you one (a lease) for a reasonable period upon royalties then prevalent in this vicinity with the usual and ordinary conditions and containing a fair minimum. Should * * * the end of the year fail to show coal * * * sufficient to warrant a lease, then we will require you to surrender * * * the property on sixty days' notice to quit * * *. We are to have access to all information * * * without restrictions. Please reply * * * that you will take possession * * * in accordance with these terms and that you will surrender possession sixty days after receipt of the notice. * * *"

This was followed by a letter dated March 4, 1912, giving detailed terms as to royalties under the lease and surface rights, to which letter the plaintiff wrote in reply on May 2:

"We are active and have drilled two holes * * *. We are making arrangements to instal electric pump * * *. From present indications we should have the place in fair shape in the course of six weeks. Of course, when we commenced active operations on the tract we accepted the conditions stated in your letter of March 4, 1912."

These letters in connection with the following averments in the statement leave nothing to conjecture or doubt as to the completeness of the contract, if we assume, as we must, that plaintiffs can make good by proof at the trial, that: they entered the land, proved for coal with due diligence at their own expense, did find coal in sufficient quantity to warrant the lease—about 500,000 tons or more; gave all information, with no restrictions, to defendant's

representatives, who periodically came on the ground and always obtained the data of plaintiffs' latest work during the period from May 14, 1912, to April 6, 1915; demanded a lease in accordance with the contract at divers times between February 13 and February 20, 1915, which the defendant failed, neglected and refused to execute as it had agreed, and by a conveyance to the Manor Real Estate Company, dated December 31, 1913, recorded in Deed Book 502, page 1, on July 20, 1914, had put it out of its power to make such a lease.

When we come, however, to consider the several specifications of insufficiency relating to damages, there is greater difficulty.

Heilman v. Weinman, 139 Pa. 142, presents facts closely parallel. There, too, a plaintiff, having developed coal on defendant's land on the faith of a parol agreement for a lease, brought suit in assumpsit for breach because the defendant had refused to execute the lease and recovered a judgment which was affirmed, the Supreme Court stating:

"If the plaintiff incurred expense in his performance of the contract and the defendant prevented him from proceeding farther without right, he was undoubtedly entitled to recover the expenses to which he had been subjected."

This decision, therefore, requires us to overrule the thirteenth exception, *viz.*: that the plaintiffs are in no event entitled to any damage predicated on expense, labor and outlay in proving for coal.

But though the statement avers facts consistent with a cause of action, and the expenditure of money in proving for coal may furnish a basis for damages, yet these circumstances alone will not of themselves call for an answer by an affidavit of defense unless the statement avers with reasonable precision the elements of damage, not only by naming them in detail but also by giving the actual money value or outlay of each item composing the total. The suit being, *inter alia*, for the recovery of these items, each should be given in dollars and cents so that the statement may be self-supporting and enable the prothonotary to liquidate the judgment. The addendum attached to the statement is in this respect insufficient; therefore the ninth exception setting out that the statement is "unsupported or verified by any statement of the actual facts, particular figures and exact details" so far as it has application to the sufficiency of the addendum as a bill of particulars, it is sustained.

The statement is not insufficient because it fails precisely to locate and to define the acreage of the land. In this respect the averments are quite as definite as the written contract; in fact, more so, as there is an averment that the particular land was conveyed by defendant to the Manor Real Estate Company by deed recorded in Deed Book No. 520, page 1, and thereby the defend-

ant's attention is specifically directed to the land covered by plaintiffs' claim. So, also, we are of the opinion that there is a sufficient averment relating to the quantity of coal (500,000 tons) which was developed as the result of plaintiffs' operation.

Averments of damage, however, based upon the royalty price per ton under the agreement being less than the market value of this coal in place (par. 18 of the statement); "the loss of the bargain" (par. 19); or from increase in the value of the land as the result of plaintiffs' operation (par. 20); or from the "difference between the price which the plaintiffs agreed to pay for the coal that could have been mined during the term agreed upon and the actual value of the same at the time of the breach, amounting in the aggregate to \$100,000 or more," (par. 21) are not sufficient. Without at this time deciding that these or any of them may under the rules applicable to measure of damages be recoverable in this action, or that such damages must be limited to the expense incurred upon the faith of the contract, or to money actually paid on account thereof (*Rineer v. Collins*, 156 Pa. 342), we are of the opinion that these four paragraphs should be consolidated and in general terms lay the damages and state the basis by which damages would be measured, as, for instance, the actual royalty value as compared with the agreed royalties and the total amount of coal mineable during the agreed term by which plaintiffs would claim to have their demands adjusted. The statement should be as exact as it is possible to make it as to the actual value of the coal in place at the time of the breach and of the value of the same on the basis of the contract, so that there shall be not a mere lump-sum-demand for general damages, which is not permissible in assumpsit, but a demand "for specific loss by reason of particular breaches; * * * there must be an averment not only as to the aggregate loss but specific statement of the damage sustained in the several distinct particulars. If the plaintiff cannot state these damages with more particularity, then she cannot prove them and a jury would not be permitted to find them in her favor." *Winkleblake v. VanDyke*, 161 Pa. 5. Though that case was decided with reference to the Act of May 25, 1887, its principles are just as applicable to the Practice Act of 1915.

We shall not indicate exactly which of the fourteen exceptions to the statement are sustained, but shall permit the plaintiff to amend the statement to accord with suggestions in this opinion, and to serve such amendment upon the defendant with a new demand for an affidavit of defense.

Exceptions to sufficiency of the statement which had raised questions of law are sustained, with leave to plaintiffs to file an amended statement.

Adrian Jones, for plaintiffs.
A. L. Williams, for defendant.

MORRETT v. FIRE ASSO. OF PHILADELPHIA.

Insurance, fire—Title of assured—Transfer of title—Privity of insurance agent—Disclaimer—Effective against whom—Evidence.

Where insurance company defends against payment of loss on property destroyed by fire, on ground that A, the assured, had not, at time policy was transferred to him, any deed to the property, but only contract of sale, and where defendant company also urged that A had during life of policy, at behest of his attorney, signed a disclaimer of title.

Held. A's standing sufficient to maintain suit, since agent of company knew at the time the status of the title and gave assent to the transfer.

Disclaimer under conditions (A having signed without knowledge of its contents) would merely be conclusive against A in the particular ejectment then pending. As to all other parties, it rose no higher than a decision against A's interests, which could be disproved by other evidence and by A himself.

Exceptions to adjudication. Common Pleas, Luzerne county.
No. 336, October term, 1916.

SCHAUER, J., March 6, 1919.—This case was tried by the Court without a jury. Exceptions have been filed to the findings of fact and of law reported by the trial judge, which must now be considered. The action is upon an insurance policy for the value of the building totally destroyed by fire and the defense was based upon the averment that the plaintiff was not entitled to recover because he was not the sole and unconditional owner of the premises in fee simple, which under the policy was a condition precedent to his right to recover.

The evidence established beyond question the fact that the plaintiff had acquired title to the property from J. C. Murray and M. J. Mulvey and wife, first by a contract for the purchase of the land and subsequently by a deed. The policy of insurance was obtained while the plaintiff's rights were evidenced only by the contract and before the delivery of the deed. The agent of the defendant who issued the policy at the time when the policy was transferred from Murray and Mulvey, in whose name it had originally been written, to the plaintiff, had full information concerning the state of the title and thereupon gave formal written assent to the assignment.

The land involved in this suit was at one time during the life of this policy the subject of an ejectment to No. 853, October term, 1914, at the suit of Murray and Mulvey against one Blanche E. Randall and this plaintiff. Murray at the time was an attorney practicing at this bar and stood in a confidential relation toward this plaintiff in that he was the plaintiff's attorney. For his own advantage in the ejectment suit Murray obtained from Morrett a disclaimer of title which was filed in that suit. The case being tried before a jury against Randall, a judgment was recovered by the plaintiffs for the land and was entered against both Randall

and Morrett. The defendant fire insurance company has offered in evidence in this case that disclaimer and that judgment and contends that thereby it has been incontestably established that Morrett was not the owner of the property during the life of the policy.

The evidence presented in rebuttal fully sustains the following finding of fact reported by the trial judge:

"Ninth. Said Morrett signed the disclaimer in No. 410, May term, 1916, in ignorance of its contents, relying solely upon the suggestion of James C. Murray, who was then and there his attorney, and one of the plaintiffs in said No. 410, May term, 1916, without being informed by said Murray of its nature or character."

In the adjudication we stated: This disclaimer was conclusive against Morrett in the case in which it was made, but as to all other persons excepting the plaintiffs in that case, it rose no higher than a declaration against Morrett's interest which could be disproved by other evidence and by Morrett himself.

To that proposition we now adhere and again refer to Chamberlayne's Evid. Sec. 1249, *et seq.*; *Floyd v. Kulp Lumber Co.*, 222 Pa. 268.

Exceptions dismissed and judgment in favor of the plaintiff for \$1,770, with interest from January 8, 1919.

J. T. Lenahan, for plaintiff.
H. B. Hamlin, for defendant.

SMITH et al. v. SCHOOL DIST. SWOYERSVILLE et al.

School code—Indebtedness of school district—Method of ascertaining.

1. Where it is not clear that a projected loan by school board would increase the indebtedness beyond two per cent. of the valuation, injunction against the loan may be refused.
2. The "total amount of indebtedness" contemplated by the school code is the net indebtedness to be ascertained by deducting from the gross debt any balance on hand in the treasury, solvent debts due the district, and revenues applicable within one year to the payment of debts.

Injunction to restrain tax levy. Common Pleas, Luzerne county. Sitting in Equity. No. 13, July term, 1918.

WOODWARD, J., October 18, 1918.—The bill in this case complains that the defendants have levied and are about to collect a tax of .02212 on the assessed valuation of the school district for certain purposes specifically set forth in the budget printed as the eighth paragraph of the bill. The items of the budget excepted to are designated, first, "temporary loan, \$11,000"; second, "architect and repairs to building \$2,150"; and third

"purchase of building lot, \$1,000." On argument the only one of these items that was claimed to be illegal and therefore beyond the power and discretion of the school board to levy taxes for, was the first, "temporary loan, \$11,000", and this because it would make the indebtedness of the district exceed the two per cent. limit which the directors could not overstep without filing a financial statement and being authorized thereto by a vote of the people. A preliminary injunction was awarded June 26, 1918. It is only now (October), four months later, that the motion to continue the preliminary injunction has been argued. In the meantime the time has expired (October 1) when the taxes could be paid without incurring a penalty, the teachers' salaries are unprovided for, and the board is finding it difficult to run the schools.

The complaint, as stated in the fifth paragraph of the bill, is "that the temporary loan of \$11,000 was made in 1917 in violation of the Constitution and statute of Pennsylvania without filing a financial statement as required by law, and without being authorized thereto by a vote of the people, the then existing indebtedness of the school district being in excess of two per cent. of the assessed valuation of all taxable property in the said school district."

The constitutional provision on the subject is found in Art. 9, Sec. 8, which forbids an indebtedness exceeding seven per cent., or an increase of indebtedness to an amount exceeding two per cent. of the assessed valuation without the assent of the electors at a public election.

The provision for the filing of a financial statement is found in the second section of the Act of 1879, P. L. 18.

The bill is apparently drawn with reference to these two provisions regulating an increase of indebtedness, but the argument turned on the application of section 508 of the school code of 1911, P. L. 333, and the bill in its terms is broad enough to cover any statutory prohibition.

Section 508 of the school code permits the incurring of a temporary debt on certain conditions:

First: That the existing indebtedness is less than two per cent.

Second: That it does not exceed one-half of one per cent. of the total amount of taxable property in the district.

Third: That it be made payable in two years and bear interest not exceeding the legal rate and be sold at not less than par.

Fourth: That it receive the affirmative vote of not less than two-thirds of the members of the board.

Fifth: That the total indebtedness including the new debt shall not exceed two per cent. of the valuation.

Sixth: That it be paid on or before coming due and shall not be renewed.

Seventh: That payment shall be provided out of current revenues.

This does not provide for any financial statement or any vote of the people, but does absolutely prohibit a temporary debt or borrowing of money that will make the total indebtedness of the district including the new debt exceed two per cent. of the valuation.

The preliminary injunction should not have been granted and is now dissolved because the temporary loan of \$11,000 has been provided for out of current revenues to be raised by the levy of 22 mills, which is within the limit of 25 mills allowed by the school code.

"If the contracts and engagements of municipal corporations do not overreach their current revenues no objections can lawfully be made to them however great the indebtedness of such municipalities may be, for in such case their engagements do not extend beyond their present means of payment and so no debt is created." Appeal of the City of Erie, 91 Pa., 398.

It is not clear that the temporary loan of \$11,000, even if it were such an indebtedness as contemplated by the school code, would make the total indebtedness of the district more than two per cent. of the valuation. For the "total amount of all indebtedness" contemplated by the school code is the net indebtedness to be ascertained by deducting from the gross debt any balance on hand in the treasury, solvent debts due the district, and revenues applicable within one year to the payment of debts. By this method of computation, as shown by the testimony taken, the net indebtedness of the defendant district is well within the two per cent. limit.

Preliminary injunction dissolved, and the defendants authorized to collect the school tax for the current year as levied without the penalty if paid within ten days after public notice of this decision.

R. Trescott, for plaintiffs.

R. B. Sheridan, G. J. Clark, J. T. Lenahan, for defendants.

McCABE *et al.* v. BORO. OF EXETER *et al.**Injunction—Boroughs—Sewer—Indebtedness.*

Injunction prayed for by borough taxpayers to prevent construction of sewer—on the ground of non-compliance with Art. 9, Sec. 10, Constitution, and of large prospective liability in addition to stated amount of bid—will be refused, where public need of such sewer is urgent, where testimony of petitioners is inconclusive and speculative, and is met by testimony of borough engineer and officials that borough is well within constitutional debt limit; that its general fund, with proposed bond issue, uncollected taxes of previous year, and small temporary loan would meet costs of proposed work.

Common Pleas, Luzerne county. In Equity. No. 1, January term, 1919.

O'BOYLE, J., March 10, 1919.—This is an application by the plaintiff, in his own behalf, as well as other taxpayers of the borough of Exeter, to restrain the borough, through its burgess and council, and the Joseph Banks Construction Company, from constructing a sewer on Wyoming avenue, between Schooley avenue and a point near St. Cecelia's Church, within the limits of said borough, and contends an injunction should be granted by this Court, for the reasons that the contract is unlawful, extravagant, and an abuse of discretion, on the part of the borough officials.

The principal questions involved in this case, according to the counsel for the plaintiff, are:

First. "Whether on November 19, 1918, the borough authorities had provided such means of payment of the Joseph Banks Construction Company contract as would amount to a compliance with Article IX, Section 10, of the Pennsylvania Constitution, which reads as follows:

"Any county, township, school district, or other municipality, incurring any indebtedness, shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof within thirty years."

Second. "Whether the proposed contract, specifications, plans and bid, do not leave the borough exposed to a large liability in excess of the stated amount of the bid, to-wit: \$18,839.70, so as to make the proposed contract improvident and improper, to such an extent as to require restraint of the contract, in its present form."

When this application was made, it was stubbornly resisted on the part of counsel for the defendant borough, on the theory that they had complied with the constitutional provision above referred to, and also, that this was not an improvident and improper contract, because it was a matter within the discretion of the council of the borough, and was an absolute necessity for safeguarding the health and comfort of hundreds of children in daily attendance at St. Cecelia's parochial school, which is located along the main thoroughfare known as Wyoming avenue, about 2,000 feet

from a point where the borough sewer, which was laid some years ago, terminates. This very large parochial school, church and parsonage, have no sewer connections, nor have they any means of disposing, by scientific processes, of the sewage. The conditions are now a menace to the health of the community, and, unless remedied, may necessitate the closing up of this whole institution. How far those conditions may have been instrumental in adding to the death rate in the recent terrible influenza epidemic in this municipality is only a matter of conjecture; but, certain it is, that under the existing facts the law should not be invoked to prevent such a needful improvement, unless it be shown that there has been a clear and indisputable violation of its provisions.

The principal contention of counsel for the plaintiff, and the testimony offered in support of the injunction, was that the constitutional inhibition of Article IX, Section 10, had been violated, in that the borough had not provided for the collection of an annual tax to pay the interest, and also the principal of the debt created, within thirty years.

Passing this point for a moment, it appears that along this highway, which is about seventy feet in width, there is a brick pavement, and, in order to avoid the necessity of tearing up this pavement and excavating a considerable depth beneath the surface, the plan adopted by the borough was to excavate for the sewer about six and one-half feet on the inside of the easterly curb line, where no sidewalks have yet been laid, as, by so doing, the brick pavement would be in no manner interfered with.

The engineer of the borough, a man of wide experience, who has already done work of this character, in and for the same municipality, has stated, that this would be the proper thing to do, and common prudence would suggest this course to the governing body, thereby leaving this very valuable highway intact.

It appears, from testimony of a very inconclusive and indefinite character, offered on behalf of plaintiff in this application, that a large item of cost, namely, about \$5,000 or more, which, they contend, has not been provided for in the bond issue, would be necessary for the cost of the planking required for the support of the sides of the excavation, even after it was carefully filled in, in order to protect the highway from a gradual depression toward the excavated ditch.

This is absolutely denied on the part of the borough engineer, who says that he had experience in similar work in the same borough, and that no lumber would be necessary to protect the sides at all, the ditch being so far from the highway as not to interfere with its solidarity.

If this be true, and we have no good reason to doubt it, because much of the testimony offered on the part of the plaintiff as to the enhancement of the cost of the work contemplated, in support of the allegation that the contract is improvident, is of a specu-

lative character, suggesting what might possibly happen, or what the cost might possibly be, under certain contingencies. But there is nothing of a definite nature to show that more than a few hundred dollars, under certain other contingencies, might be added to the sum total of the contract.

It appears that the municipality had not within several thousand dollars—even assuming that the contract would cost as much as contended for by the plaintiff—reached its constitutional limit of two per cent.; and the only advantage which could be gained at all by granting this injunction would be to re-advertise the whole thing and have a larger bond issue. This, in view of the fact that the borough has established that it has \$4,580 in its general fund on January 1, 1919, and the bond issue of \$15,000, and an amount available from uncollected taxes on 1918 duplicate of \$3,380.78, making a grand total of nearly \$23,000, all of which could, if necessary, be applied to the payment of this indebtedness, we think would be a needless and improvident thing to do.

The borough officials have stated that the \$15,000 which they propose to raise by a bond issue, and the available funds in the treasury, and also, their ability, if necessary, to make a temporary loan, as stated in the advertisement calling for bids for the work, are the means by which they intended to pay for the indebtedness to be created, and it would be absurd to require them to re-advertise and have the additional expense and delay, without a single advantage to be gained.

In view of these circumstances it would be imprudence, to say the least, that they should issue bonds for more than they need.

We are firmly convinced that if this sewer is ever to be constructed—and it must inevitably be—the proper time to do so is before the coal has been mined from underneath this locality, and that those necessary improvements should be made at the places and times when the burden of taxation would fall equitably and lightly upon the shoulders of the resident taxpayers and property owners of the community.

With relation to the alleged violation of Article IX, Section 10, of the Constitution, if we eliminate the speculative features from the plaintiff's evidence, and take what has been actually shown by the figures, the borough has provided the means of paying off the obligation created by this improvement, and it would also have the necessary money for running and operating the borough, and in the event an emergency should arise, would still have the power of making a temporary loan, which would be paid for by taxes levied and collectible in the current year.

Municipalities have their duly elected representatives to discharge certain functions imposed by law, and these functions should not be interfered with by injunction, save only where there is a clear violation of some duty, or where great injustice would result from the performance of the act complained of.

Under the circumstances of this case, we are unable to reach the conclusion that this injunction should be granted. In our opinion this work is necessary and should be done at this time, for reasons which we have already stated; and we are not convinced that there is any violation of the constitutional inhibition contained in Article IX, Section 10, of the Constitution, nor do we believe, after a careful examination of the whole case, that the contract is improvident and improper. Injunction refused.

J. D. Farnham, J. M. Norris, for plaintiff.

W. W. Hall, T. F. Farrell, F. A. McGuigan, for defendants.

NANCARROW *v.* KLEIN.

Election wager—Right of owner to recover—Demand.

Where after election wager, forbidden by common law and statute, stakeholder refuses to turn over money to winner and suit is brought by loser to recover, and more than two years elapses without suit by poor board to recover, the right of the owner to reclamation is not impeded. None of the cases require demand preliminary to suit.

Affidavit of defense and exceptions. Common Pleas, Luzerne county. No. 582, January term, 1916.

STRAUSS, J., December 19, 1918.—The plaintiff, in September, 1913, wagered \$50 upon the result of an election in Hanover township, deposited the money with the defendant as a stakeholder, and lost the bet. After the election defendant refused to turn the money over to the winner, but retained it. More than two years later the plaintiff brought this suit to recover the \$50.

The affidavit denies that plaintiff is entitled to recover, because there is no averment in the statement that plaintiff has made demand on the defendant for a return of the money, but has averred himself to be satisfied to have the defendant pay the money to the winner. This affidavit raises a question of law which we decide against the defendant. Under the 20th Section of the Practice Act of 1915, he may now "file a supplemental affidavit to the averments of fact of the statement within fifteen days," if he has a defense on the merits.

This bet was forbidden both at common law and by statute, *McAllister v. Hoffman*, 16 S. & R., 146. More than two years having elapsed since the making of the bet, and the poor district having failed to bring suit to recover the money, as it might have done within that period under Act of July 2, 1839, 2 Purd. 1333, Sect. 108, "the owners right of reclamation is not impeded." None of the cases have required a demand preliminary to suit. *Forscht v. Green*, 53 Pa. 138, and cases there cited.

Question of law presented by the affidavit of defense is decided against the defendant.

S. S. Herring, for plaintiff.

W. J. Goeckel, for defendant.

FEELEY *v.* CAMPBELL *et al.*

Contract—Moving picture film—Custom—Exclusive rights—Injunction.

1. Where after contract to furnish moving picture film to A, with provision for damages, in case of failure to furnish, nominated as one-fourth the unearned rental, film corporation furnishes same picture to another house in same city and A prays for injunction, averring custom in the business to allow exclusive rights to first contractor, same will be refused on ground of plaintiff having adequate remedy at law.
2. Averment of custom as to exclusive rights would need specific information of facts from which such inference could be drawn.

Motion for preliminary injunction. Common Pleas, Luzerne county. In Equity. No. 2, December term, 1918.

STRAUSS, J., November 21, 1918.—The plaintiff seeks to enjoin Hugh L. Campbell from producing at his moving picture house in Hazleton a "Charley Chaplin" moving picture, entitled "Shoulder Arms", on November 21, 22 and 23, on the ground that the plaintiff had on April 12, 1918, by contract with the First National Exhibitor's Circuit, also defendant, acquired the exclusive right for the first production of this picture in Hazleton, and is about to produce it on the dates above mentioned; and that a contract made subsequently between the said First National Exhibitor's Circuit, Inc., and Campbell for the production of the same picture on these dates in Hazleton was in violation of the plaintiff's rights, and because this violation will cause damages that are so uncertain and difficult of ascertainment that there is no adequate remedy at law.

Attached to the plaintiff's bill is a copy of the contract under which he claims, and there is absolutely no language in it indicating an exclusive grant. To overcome this difficulty the plaintiff has presented evidence by affidavits that a custom exists in the moving picture business or profession, that first exhibitions of films authorized by contract such as this, shall be exclusive in the first licensee in cities having a population not to exceed thirty thousand. It is this custom that must be read into the contract to give the plaintiff any standing whatsoever.

A further reading of the contract discloses a provision: "In case either party hereto shall fail to keep, observe or perform any condition of this contract on his or its part to be kept, observed and performed, the injured party shall have and recover of the defaulter as liquidated damages and not as penalty, a sum equal

to twenty-five per cent. of the unearned rental price reserved in this contract. This stipulation for liquidated damages is made because of the difficulty of proving actual damages in the event of any such default; the actual damages under such contract as this being speculative and impossible of ascertainment." (The unearned rental at this time is \$770.00 and the "liquidated damages" would therefore be \$192.50.

Notwithstanding these sweeping covenants and explanations for the adopting of liquidated damages instead of penalty, the plaintiff still argues that there is no adequate remedy at law if defendants are allowed to exhibit, as they propose to do, because the clause quoted in the contract is Pickwickian and does not give liquidated damages but only a penalty; and that the damages remain as the contract deceptively declared they should not be, "speculative and impossible of ascertainment."

If we were to grant this injunction and postpone for five days the hearing of the motion to dissolve, then as to the particular film "Shoulder Arms", such damages as might be done to the defendant by an erroneous decision would be, according to the plaintiff's own theory, beyond recall because not compensable at law; it having been conceded at the argument that the defendant is about to exhibit this film under a contract in every respect similar to the plaintiff's. The plaintiff is thus in the position of seeking as the outcome of this suit to shift the damage arising from having himself made an indefinite and worthless contract and to place these damages by the aid of the strong arm of injunction upon the shoulders of Campbell.

It was said in *Steeper v. Williams*, 48 Pa. 450, cited with approval in *Wilkinson v. Colley*, 164 Pa. 40, with reference to cases in which contracts relating to penalties or liquidated damages were construed: "Upon no questions have Courts doubted and differed more. It is unnecessary to examine the numerous authorities in detail, for they are neither uniform nor consistent. No definite rule to determine the question is furnished by them, each being determined more in direct reference to its own facts than to any general rule. In the earlier cases the Courts gave more weight to the language of the clause designating the sum as a penalty or liquidated damages. The modern authorities attach more importance to the meaning and intention of the parties. Yet the intention is not all-controlling, for in some cases the subject

matter and surroundings of the contract will control the intention where equity absolutely demands it."

The most recent decisions upon the subject show the same uncertainty if not confusion. (See *Stewart v. Turner*, 67 Superior Ct. 255.)

If such custom exists as plaintiff claims, then the First National Exhibitor's Circuit violated its contract with plaintiff by making a contract with Campbell. We must assume that the parties through the very definite terms adopted in the writing intended to substitute for every other form of remedy in case of breach, an action at law to recover the liquidated damages prescribed.

We have also serious doubts whether affidavits that go no further than to set out deponents' inferences concerning the existence and legality of a custom would be sufficient without giving specific information as to facts from which such inferences have been drawn. Because there is adequate remedy at law we refuse this injunction. Preliminary injunction refused.

J. H. Bigelow, for plaintiff.

E. J. Gormley, B. R. Jones, for defendants.

WELLES ESTATE *v.* CITY OF WILKES-BARRE.

Eminent domain—Value of land—Estimates based on assessments for taxation.

Where in condemnation proceedings assessment for taxation is offered and received against objection as measure of land value, new trial will be granted. Trend of decisions is that such assessments, even though recent and though offered by owner, are unreliable in estimating value.

Rule for new trial. Common Pleas, Luzerne county. No. 729, June term, 1916.

STRAUSS, J., March 19, 1919.—There is only one reason for new trial advanced which we need consider. The assessments for purposes of taxation were admitted in evidence upon the offer of the defendant against objections. At the time we were referred by the defendant to two cases, viz.: *Smith v. Penn'a Coal Co.*, 141 Pa. 68, and *Miller v. Windsor Co.*, 148 Pa. 429. Our attention was not called to the more recent decisions, *Marine Coal Co. v. Railroad Co.*, 246 Pa. 478, and *Girard Co. v. Philadelphia*, 248 Pa. 179; nor to the earlier *Hanover Water Co. v. Ashland Co.*, 84 Pa. 279.

In 141 Pa. (*supra*) it was decided that the assessment was admissible as evidence of much weight, but that it did not operate as an estoppel in favor of the company, it having been argued that the plaintiff who was an assessor and had participated in making the assessment was therefore estopped from denying its correctness.

148 Pa. (*supra*) declared: "At best such assessments or valuations are a very unreliable measure of market value at the time they are made. As a rule they differ so widely from the actual market value that no one ever thinks of accepting them as a measure by which to sell or buy. * * * If the offer had been to prove a recent assessment of plaintiff's property it doubtless would have been entertained; but when, in addition to the unreliability of such assessments as a measure of value, the Court was asked to receive evidence of one made eight years before the property in question was taken, it is not at all surprising that the offer was rejected as too remote in point of time."

Both these cases were condemnation proceedings, the one involving a taking by a railroad and the other by a water company. The offer before us was of a recent assessment and therefore in line with this deliverance seemed clearly admissible.

But in 246 Pa. (*supra*) the Supreme Court stated: "We held in 84 Pa. 279, and it is supported in 128 Pa. 233, that assessments are not competent evidence to aid the jury in assessing damages in condemnation proceedings. This, of itself, we think is a sufficient reason for refusing to interfere with the Court's discretion in refusing evidence as to assessed value of lands in that vicinity asked plaintiff's expert witness on cross examination. As pertinently suggested by plaintiff's counsel, if assessments are not evidence of the value of the property, it is immaterial whether the witness knows them or not." The syllabus in this case is: "In eminent domain proceedings the assessed valuation of the land condemned may not be shown on cross examination." It will also be observed that here it would appear to be within the Court's discretion to admit or reject the evidence.

In 248 Pa. 179, the assessment was offered not by the municipality which proposed to take the land, but by the owner; and in this respect there is a possibility of distinguishing 141 Pa. and 148 Pa.

But when we read the opinion in 248 Pa. we find that all of these cases have been under consideration by the Supreme Court, and that in this latest adjudication it is declared: "None of the authorities relied on rules that such assessments are to any degree admissible as to evidence of value taken or damaged by a municipality.

In view of this definite and positive statement we have concluded to grant a new trial at which this sort of evidence may be excluded and thus a record made up on which the distinction, if any, between the case on trial and these several apparently conflicting decisions may be made by the appellate court.

Rule for new trial absolute.

J. T. Lenahan, C. B. Lenahan, for plaintiff.
E. C. Jones, C. F. McHugh, for defendant.

QUIGLEY v. BOROUGH OF MINERS MILLS.

Boroughs—Act 1915, June 24, 1885—Judgments—Mandamus—Intervention by taxpayer—Certiorari—Laches.

1. Where denial of jurisdiction which would permit a certiorari after twenty days is based upon service of process and not upon the cause, certiorari must be sued out at least within twenty days after knowledge of judgment obtained.
2. Exception that a judgment was fraudulently obtained, with certiorari taken three months after rule for judgment, will be overruled on ground of delay.
3. Where a judgment against a borough, obtained on a baseless claim, without due notice, is followed by reasonably prompt application for relief, rightful intervenor should be allowed appeal *nunc pro tunc*.
4. Taking Sec. 2, Act 1895, P. L. 426, with Act June 24, 1885, P. L. 160, the legislation furnishes a taxpayer adequate opportunity to contest, when the authorities by negligence or collusion do not contest, unfounded claims against a borough, in the manner and to the extent that authorities themselves might proceed.

Certiorari. (With which are submitted five cases between same parties, viz.: No. 1075, October term, 1916; No. 793, November term, 1916; No. 77, May term, 1917; No. 484, July term, 1917, and No. 852, October term, 1917.) Common Pleas, Luzerne county. No. 529, March term, 1918.

FULLER, P. J., May 20, 1918.—With this certiorari is connected and submitted a rule to open the judgment involved in it, for which a transcript was entered in this court, March 16, 1917, to No. 77, May term, 1917, together with a rule to allow appeal from that judgment *nunc pro tunc*; and likewise similar rules in four other similar cases between the same parties.

Certiorari was only issued in the one case, but the testimony taken therein is submitted for use in deciding all of the cases, as all, *de hors* the record, are governed by the same facts. This manner of submission involves a general view of the litigation.

In each case plaintiff claimed a monthly salary of \$55, as health officer of the defendant borough.

The service of process has been attacked only in No. 77, on which the certiorari was taken.

In each case the defendant was in default, and no appeal was ever taken from the judgments of the magistrate rendered in the respective cases.

In each case, on the respective transcripts, the Court, on September 27, 1917, authorized mandamus execution.

In each case, on December 3, 1917, the defendant, by Michael Mayock, its treasurer, filed answer to the mandamus execution

averring, *inter alia*, that the borough council never ratified any amount to be paid to the health officer for any services, as provided by law; and on the same day the Court, on the petition of John Koval, Sr., in the capacity of a taxpayer, granted a rule to show cause why an appeal from the judgment should not be taken *nunc pro tunc*, or why said judgment should not be opened and the defendant let into a defense.

It also appears from testimony and supplemental petition, that said Koval was a resident and councilman as well as a taxpayer of the borough.

His petition avers, "that the said burgess, Frank Ward, never informed or notified the borough council of the fact that a summons was served upon him, or that the said suit had been brought, and the first knowledge that the council or any of the taxpayers had of the bringing of said suit was when the execution was served upon the treasurer; petitioner believes that the burgess, in violation of his duties, intentionally failed to give notice of the bringing of said suit to the council, so that no appeal would be taken in this case, and in so doing has committed a great injustice to said borough; and so petitioner asks permission to intervene for the reason that said borough has a full and complete defense to the plaintiff's claim, viz.: (a) The said T. F. Quigley never performed any services as health officer, and (b) the council never ratified any salary of the said T. F. Quigley as such, as required by the Act of June 19, 1913, P. L. 471."

Each petition was accompanied by the affidavit of the petitioner, "that he is a taxpayer of the borough of Miners Mills, and believes that if said judgment is permitted to stand injustice will be done to said borough in said judgment."

Pending submission of these rules, the petitioner, Koval, on February 28, 1918, took out certiorari from the judgment in No. 77.

The testimony taken by the petitioner in the certiorari and submitted with the other cases, was to the following effect:

The petitioner testified that he has been a councilman of the borough since January, 1916; that Frank Ward, the burgess, had no wife at the time of service in No. 77, May term, 1917; that T. F. Quigley never to his knowledge acted as health officer; that the council never ratified any salary of health officer; that the council had no notice of the suits at all; that the burgess never

notified the petitioner as councilman, and never brought before the council the fact of suit having been brought; that the first notice of such a thing was the mandamus execution; that during 1916 and 1917, the council were deadlocked three to three on every proposition including payment of the Quigley bills.

This testimony is fully corroborated by that of Thomas McHale and Charles Burrier, also councilmen, who with the petitioner apparently formed one of the two tied factions.

The minutes themselves disclosed no ratification of the salary.

The minutes also disclosed, and Mr. Burrier testified, that on May 22, 1916, the council took the following action: "Whereas, it is a well known fact that the Board of Health has failed to perform its duties to the detriment of the health of the people of this borough, and I, Thomas R. Morgan, president of the town council of the borough of Miners Mills, do hereby declare the seats of all the old members vacant, namely, Martin B. Finn, John S. Hogan, Otto Kiel, Dr. R. S. Woerhle, and Michael Mayock, and appoint in their place the following: J. C. Barnett, John Finn, Dr. John Hislop, John S. Hogan and Otto Kiel; and the secretary is hereby directed to notify each of the old members, etc."

The plaintiff admitted that the burgess, Frank Ward, had no wife at the time of the service, and has submitted no testimony except that of the constable who served the process, to the effect that at some house in the borough a pretty stout woman told him that Ward's wife was in, whereupon he gave her the summons.

No answer was ever filed to the petition, nor was any testimony ever taken by the plaintiff to refute its allegations or the testimony of the petitioner concerning the merits of the claims.

I.

We will first dispose of the certiorari on the exceptions that the service was bad and that the judgment was fraudulently obtained.

It must be noted that the judgment on which the certiorari went out February 28, 1918, was obtained February 13, 1917, and brought to knowledge at least as early as December 3, 1917.

1. The return of service was "by handing a true and attested copy to an adult member of the family of Frank Ward, burgess, viz.: his wife, at his dwelling house, etc."

This upon its face is conceded to be good, but is attacked on the ground, established by admission as well as by proof, that said Ward had no wife.

Without deciding whether the service thus good upon its face could be properly thus attacked or that the lack of a wife would vitiate a service apparently made upon another adult member of his family, misdescribed as wife, it is enough to say that where the denial of jurisdiction which would permit a certiorari after twenty days, is based upon the service and not upon the cause, as in this case, the certiorari must be sued out at least within twenty days after knowledge of the judgment is obtained.

Certainly the lapse of almost three months after knowledge and before certiorari, must be held fatal under many decisions which we need not cite.

2. The same consideration we think involves the exception that the judgment was fraudulently obtained.

Knowledge of the facts on which this contention is based came at least as early as December 3, 1917, when the rules were obtained, and the subsequent lapse of almost three months before certiorari was too long.

Therefore we decide that the exceptions on the certiorari must be overruled and the proceeding dismissed, thus restricting relief to the rules.

II.

The rules were granted (a) to show cause why the judgment entered upon the transcript should not be opened, (b) to show cause why appeals should not be allowed *nunc pro tunc*.

Counsel for petitioner now concedes that the Court has no power to open the judgments, and so entire reliance is placed upon the claim to appeal *nunc pro tunc*, with the alternative contention that the Court even if powerless to grant such relief, will at the very least withhold its executionary process for the collection of a judgment founded on fraud.

These contentions are predicated upon the following matters, which are clearly established, viz.:

(1) During the period covered by Quigley's claim for salary as health officer, he had not been appointed such by the health board; (2) nor, if so appointed, was his salary ever ratified by the council; (3) nor did he perform any service as such; (4) therefore he had not a particle of claim on which he could have recovered judgment against a party appearing and defending; (5) the burgess, upon whom the summons was served in the suits

by Quigley, failed either by fraud or negligence to apprise the council or take other steps for the borough's protection, and so judgments were obtained in secrecy and by default without knowledge of council until shortly prior to rule; (6) Quigley has not undertaken to sustain his claim or controvert the above matters by testimony of himself or of the burgess, or of any councilman, or by a scintilla of other evidence whatsoever; (7) to enforce collection under the circumstances would constitute a fraud upon the borough, compelling it to pay money which it does not owe; (8) knowledge of the facts came to the petitioner shortly before December 3, 1917, when answer was made to the mandamus and these rules were obtained.

Confessedly the Court should grant relief if it has the power, depending first upon a taxpayer's right to intervene at all, and, second, the manner and extent of intervention.

1. The protection of taxpayers as such in respect to claims against a municipality by allowing intervention in proceedings to which they are not in the first instance party, is a statutory principle firmly embedded in our jurisprudence.

Not to cite other instances, the General Borough Act of 1915, at page 426, under the specific title "Defenses by Taxpayers," expressly provides:

"Section 2. Any taxpayer of any borough may inquire into the validity of any judgment or defend the borough in any suit or judgment upon filing a petition with the Court of Common Pleas of the county in which such suit is pending or judgment exists, accompanied by an affidavit that the taxpayer believes that injustice will be done to the borough in such suit or judgment."

"Section 3. Whenever a judgment is rendered by any justice of the peace or alderman, against any borough, and a right of appeal is given to such borough, and for ten days immediately after the rendition of such judgment the borough officials neglect to perfect an appeal, any taxpayer of such borough may take an appeal in behalf of the borough from such judgment, to the Court of Common Pleas of the county within the time prescribed for the taking of such appeal."

"Section 5. On the filing of such appeal in the Court of Common Pleas of the county, the taxpayer shall be made a party to the suit and shall have the right to defend such borough therein."

It is urged by plaintiff in the present case that Section 2 of the foregoing only applies to judgments or proceedings in the Court of Common Pleas and does not apply to those recovered before a magistrate, citing the case of *Howers Appeal*, 127 Pa. 134, decided under Act of March 23, 1877, P. L. 20, whereof said Section 2 is substantially a re-enactment as to boroughs; but in that case the proceedings were in the Court of Quarter Sessions, the point now raised was not involved or decided at all, and we

think it is conclusively met by the Act of June 24, 1885, P. L. 160, which provides that judgments entered upon transcripts "shall be and have all the force and effect of a judgment originally obtained in the Court of Common Pleas of said county."

Taking the sections as a whole, we are fully persuaded that this legislation furnishes, as it was intended to furnish, a taxpayer with adequate opportunity to contest, when the authorities by negligence or collusion do not contest, unfounded claims against a borough in the manner and to the extent wherein the authorities themselves if not faithless might proceed.

2. The principle of *nunc pro tunc* has been so often recognized in applications of this character, for relief on equitable grounds against prescribed limitations of time, that we need only mention for illustration, Zeigler's Petition, 207 Pa. 131, and cases therein cited, with the dictum in *Kutz & Son v. Skinner*, 7 Superior 346, that "the granting or refusing of an appeal *nunc pro tunc* is a matter of sound discretion."

Guided by a sound discretion, frequently exercised, Courts may and should allow appeals *nunc pro tunc* when a party or a rightful intervenor discloses equitable grounds presented without laches, and in our opinion such grounds exist when a judgment is obtained upon a baseless claim without notice followed by reasonably prompt application after discovery.

We are asked to withhold executionary process even if we do not allow the appeal, on the authority of *In Re Indebtedness of Marcy Township*, 9 Kulp 424 (1899), in which a judge of this court said: "Whilst in this proceeding the Court has no power to try and pass upon the merits of the claim presented, it certainly will not order executionary process to collect from taxpayers money for the payment of illegal or fraudulent claims, whether they be simple claims or founded upon bogus judgments."

The proceeding was by alternative mandamus to compel the levy of a special tax for the payment of township indebtedness and what the Court designated "bogus judgments" were "transcripts of alleged judgments before justices when in fact there was no case upon the docket of the justices," that is, no judgments at all.

This citation, if course, is not strictly pertinent against a mandamus execution on a judgment regularly obtained and docketed; and while the principle enunciated might desirably be extended to cover the case at bar, this would involve a summary and final determination which we should not make at this stage.

Every just right will be protected by allowance of appeal *nunc pro tunc*.

Therefore, within ten days, the petitioner, taxpayer, is permitted to take, perfect, and file an appeal *nunc pro tunc*.

M. F. McDonald, for plaintiff.

T. F. Farrell, H. L. Freeman, for defendant.

KNELLY v. C. R. R. OF N. J.

Negligence—Railroad—Public playground—Notice—New trial.

Where in suit against railroad for negligent operation near a public playground Court affirms plaintiff's request that if the playing were continuous and not occasional, and of such frequency as to be sufficient to bring constructive notice to railroad that the place was being used, and railroad charged with "duty of extra precaution, etc.,," and this is weakened by the later charge that there would have to be "something like continuity," "reasonable repetition from day to day during period that children go to playgrounds" thus to a certain extent obliterating the impression on jury of the foregoing assent, and verdict for defendant, new trial will be allowed.

Rule for new trial. Common Pleas, Luzerne county. No. 385, May term, 1914.

STRAUSS, J., January 17, 1919.—We have concluded that a new trial ought to be awarded. It has been decided many times that where a party presents to the Court a well-constructed request for definite instructions to the jury, the request should be affirmed or denied without qualification.

After a careful consideration of the answers to plaintiffs' second and fourth requests, we are now of the opinion that they were so drawn that they ought to have been affirmed without comment. Especially in the answer to the fourth point we may have erred through over-caution.

The body of the charge contained full and adequate instructions relating to constructive notice from which knowledge of the use of the playground might be inferred. We said:

"If as a matter of fact there was a playground there, the circumstance might come to the knowledge of the railroad company by what is called in law constructive notice; that is, notice which arises from the fact that a particular thing exists, or that a particular use of a particular place like this locality is being made continuously, and for such length of time that the law infers notice to the person who must be affected in order that the plaintiff may recover, namely, to this defendant. Occasionally playing at that point, not systematic, at long intervals, would not create a permissive playground. It would require more than that. There would have to be something like continuity, and by continuity I do not mean playing day and night, nor do I mean playing every day, because we know that playgrounds, for instance, are not used in the winter time; but there must be that reasonable repetition from day to day during the period that people go to playgrounds, that children go to playgrounds, as will of itself be notice to the defendant company that such a claim is being created against it, that such a privilege is being established by practice."

The plaintiffs' fourth point was as follows:

"If the jury believe from all the evidence that the children of

the neighborhood used the tracks of the defendant at the place of accident for playground purposes for a number of years prior to the accident, then you would be warranted in finding that in moving its trains on the tracks the defendant did so with knowledge that the children of the neighborhood had been using the place as a playground and that they were required to anticipate that they would continue so to do."

The Court answered:

"I affirm that with this slight modification: That if the playing that has been spoken of was continuous and not occasional; if it was with such frequency as to be practically continuous, sufficiently to bring constructive notice to the defendant that the field and the place was so being used, then that point is affirmed."

The answer was definite that playing to produce constructive notice must be continuous and not occasional, and that it must be with such frequency as to be practically continuous. This was much stronger than the body of the charge where it was said there would have to be "something like continuity, * * * reasonable repetition from day to day during the period that * * * children go to playgrounds." As this was the final instruction upon the subject, it may have to some extent obliterated the effect of the qualifications in the general charge.

Rule for new trial made absolute.

'E. G. Butler, Rush Trescott, for plaintiffs.
Arthur Hillman, E. C. Jones, for defendants.

ZBORIGAN *v.* JACOBOSKY *et al.*

Ejectment—Sheriff's sale—Inadequate consideration—Trustee ex maleficio.
Where one buys at sheriff's sale for consideration far below value of the property, under pretense of buying for execution defendant, law would decree the sale fraudulent and void. Plaintiff's contention that trusteeship *ex maleficio* was created overruled. Purchaser would not hold as trustee for he would not hold at all.

Exceptions to plaintiff's abstract. Common Pleas, Luzerne county. No. 346, January term, 1905.

FULLER, P. J., October 3, 1918.—This action of ejectment was brought December 30, 1904, when plaintiff filed his declaration and abstract of title. February 3, 1905, Isaac Jacobosky, one of the defendants, filed a disclaimer. August 22, 1908, the other defendant filed exceptions to the sufficiency of the abstract. May 8, 1913, the plaintiff was permitted to file a new declaration and abstract in place of the original, which had been lost or mislaid.

The exceptions have not been renewed against the new abstract and are themselves now lost or mislaid.

Neither party seems to have been in very much of a hurry to

press the assertion of their respective rights, nor very particular to preserve the record evidence of the precise assertion. Nevertheless we may assume that the new abstract is identical with the original, and in the light of oral argument we may also assume that the exceptions attack the same in the single respect hereinafter stated.

The abstract in substance avers that the plaintiff by a chain of title fully set forth, was on December 8, 1900, owner of the land in suit, which on that date was sold at sheriff's sale and bought by defendants for \$59.14, although worth \$5,000, this disastrous result being accomplished by the fraud and artifices of the defendants in dissuading intended bidders from bidding thereon, by the pretense of buying for the present plaintiff, defendant in the execution; and the plaintiff claims that by force of the foregoing, defendants became trustees for him, *ex maleficio*.

The exception urges that a trust *ex maleficio* would not be created without an agreement, which is not averred, between plaintiff and defendants, that the latter would buy for the former's benefit.

We cannot sustain this exception.

It would certainly be sufficient ground to set aside a sheriff's sale, that the land was struck down to the purchaser in the manner averred, which constitutes fraud.

By reason of such fraud the law would pronounce the sale void.

No agreement would be necessary, nor breach of confidence, nor, strictly speaking, any kind of a trust, *ex maleficio* or otherwise.

The point is, that the purchaser in such a case would not hold as trustee, for he would not hold at all.

In *Hogg v. Wilkins et al.*, 1 Grant 67, the relation of the parties was reversed, plaintiff in ejectment being purchaser under execution against defendants in the ejectment, but the pertinent principle as aptly defined by the Supreme Court would apply, viz.: (On page 71.)

"The whole case is a much simpler one than the counsel of either party seem to have thought it. There is but one point in it, and that is, whether the purchase was honest or not. Here the plaintiff encounters serious difficulty. It is alleged (and the allegation is not without evidence to support it), that he declared his intention to purchase and hold for the defendants until they could redeem it—that he fraudulently made this declaration to persons who intended to be his competitors at the sale, whereby he kept them away, and so got the land at a price considerably less than it would have sold for if his conduct had been fair. If he did this thing, he has no interest or right whatsoever in the land; his purchase was entirely void; the title remains where it was before the sale; he does not hold as trustee, for he does not hold at all. The law has always been so ruled, and in one very

recent case, not yet reported, the subject was carefully considered. It is not necessary to repeat the reasons and the authorities on which the rule is founded."

(On page 72): "To avoid misconstruction, it may be necessary, at the risk of repetition, to say that Hogg's title can only be impugned by proof: (1) that he falsely declared his purpose to buy the land for Shoemaker and Blocher, upon their refunding to him the purchase money, with interest; (2) that this declaration was made with the fraudulent design to prevent or diminish competition by persons who might be bidders; and (3) that by this means he got the land at a price less than its value, and less than it would have brought at a fair sale. If this be established to the satisfaction of a jury, he has no shade of a claim either in law or equity. Of course, we give no opinion upon the weight of the evidence."

The same principle is laid down and applied in a number of cases from which we need only cite *Gilbert v. Hoffman*, 2 Watts 66, *viz.*:

"There results from these authorities that where there is actual fraud, no title passes to the vendee whether it be a private or judicial sale; and title is void to all intents and purposes and is the same as if no deed had ever been executed;" and from *Walter v. Germant*, 13 Pa., at page 517:

"If the purchaser falsely appeal to the benevolence or the cupidity of the bidders or creditors by giving out that he is buying for the family or to sell again at an advanced price for the benefit of the creditors, the property will remain with the debtor subject to subsequent executions. Any false declaration of intention to gain a particular advantage would have that effect."

In the light of these authoritative intimations we feel constrained to overrule the exception. If the plaintiff can prove his averments by clear, precise and indubitable evidence, he may be entitled to recover; unless he is put out of court on motion for *non pros.* by reason of laches. Although the sheriff's sale occurred December 8, 1900, the action was not brought on the original summons until December 30, 1904, the alias summons, indeed, not being issued until November 11, 1905, and it has since lapsed into sound slumber during almost fourteen years, with very slight symptoms even now of arousement.

If the plaintiff really expected to make out a case, or had not entirely abandoned his action, it does not seem likely that he would thus procrastinate in urging a claim dependent upon the oral testimony of witnesses living in December, 1900, who must testify with precision from memory after all this lapse of time.

However, on the present exception, which we dismiss, the suggestion of *non pros.* is *obiter dictum*.

S. S. Herring, for plaintiff.

J. T. Lenahan, for defendants.

IN RE HABEAS CORPUS SCHULTZ.

Habeas corpus—Case of minor child.

When a child at dying request of its mother has been taken by the maternal grandmother, and the father asks for the custody, the two homes balancing about equally as far as the child's welfare is concerned, the father's natural right would decide the question in his favor.

Common Pleas, Luzerne county. No. 10, March term, 1919.

WOODWARD, J., February 10, 1919.—This is a proceeding on the part of a father to get possession of his daughter, aged six years, now in the custody of the respondent and her maternal grandmother, who took the child on the death of its mother at the mother's dying request. The Court has to choose between the natural rights of the child's father and the desire of the child to remain with her grandmother, where she is at present, and the guide to the Court's action in such case is always the welfare of the child.

If the child is given to her father he will take her to his home in Nanticoke, where he lives with his mother, who has been before us and who appears to be a respectable, kindly and sensible woman, fifty-eight years old, who has brought up a family of children of her own, and is fond of her granddaughter and wishes to care for her; who now lives in a flat of four rooms, which will make a comfortable home for the child and her father, but for the greater comfort of the family Mrs. Schultz says that she will rent a house if she gets the child, where they will have more room.

The other grandmother, Mrs. Long, who now has the child, has a comfortable home in Kingston, where she lives with her husband and no other children, and where the child has been since its mother's death, well cared for and attending the public schools in Kingston on week days and the Methodist Sunday School on Sundays. The child, who is six years old, is intelligent and attractive, says that she loves her father and her paternal grandmother, but that she loves her maternal grandmother better and prefers to stay where she is, and it is apparent to the Court that it will be hard at first for the child to make the change, because it will necessitate her removal to a different locality, where she will be among strangers and will have to make new friends, and it will undoubtedly make the child unhappy at first until she gets accustomed to her new surroundings.

There is little choice between the two homes, but we are not sure that in the long run the child will not be under better influences with Mrs. Schultz than with Mrs. Long. Mrs. Long, we should judge from her appearance when before us, would be more indulgent to the child than Mrs. Schultz. But indulgence is not what a child of that age needs so much as intelligent discipline, and we think from the appearance of the parties that the discipline and the plainer living which she would receive at the hands

of Mrs. Schultz would be more beneficial for the child in the long run; so that the choice between the different homes is pretty evenly balanced, with an inclination slightly in favor of the paternal grandmother, Mrs. Schultz. Under these circumstances the natural rights of the father to the custody of his child turns the balance in his favor, and we, therefore, have decided to award the child to its father. The custody of Laura May Schultz is awarded to her father, Fred Schultz.

C. A. Shea, for petitioner.

B. W. Davis, for respondent.

MEHALICK *v.* TOMSHE *et al.*

Foreign attachment—Service—Judgment—Assessment damages.

1. Foreign attachment served on tenant in possession of defendant's land must aver—Act June 13, 1836—not only that garnishee was summoned, but that he was in actual possession holding under defendant.
2. Where plaintiff takes rule for prothonotary to assess damages, record should show service of said rule on defendant or garnishee, fixing of time for hearing, notes of testimony presented to prothonotary, and that prothonotary assessed damages "upon evidence produced to him or on affidavit of plaintiff or some other person cognizant."
3. In discretion of Court, where circumstances warrant, leave may be granted sheriff to amend his return, though as a rule application made long after return day and after defendant had moved to strike off service would be too late.

Foreign attachment. Rule why return of service of foreign attachment should not be set aside and judgment opened, etc. Also rule why sheriff should not be permitted to amend his return. Common Pleas, Luzerne county. No. 126, November term, 1916.

STRAUSS, J., November 25, 1918.—The writ in statutory form commanded the sheriff to attach goods, chattels, lands and tenements; but, incorporated in it the following directions contained in the praecipe, was a command that he especially "attach houses, lands and buildings of the defendant located at the northwest corner of Winters avenue and Wayne street in West Hazleton borough, being held in possession of Harvey Bredbenner and Albert Houser, tenants holding under the defendant."

The sheriff returned that he had summoned Harvey Bredbenner and Albert Houser as garnishees, and that he had attached as within commanded all the goods and chattels, rights and credits, lands and tenements, moneys, legacies and interests in the hands of the garnishees."

On March 13, 1918, at the third term after the issuing of the writ, the plaintiff caused judgment by default to be entered for want of an appearance, and on the same day entered a rule for the prothonotary to assess damages and the prothonotary therewith entered upon the docket an assessment of damages at \$546.25. Subsequently alias *fi. fa.* and *vend. exp.* were successively issued; upon the latter the sheriff advertised for sale, not land at the

corner of Winters avenue and Wayne streets as might have been expected from the contents of the original writ and the sheriff's undescriptive return; but lands on the north side of Winters avenue, between Warren and Wayne streets, at the corner of Warren and Winters avenue.

On August 12, 1918, after advertisement and before the day set for sale, the defendant obtained a rule to set aside service to strike off judgment and to stay execution because the sheriff's return was ineffective to attach the land, and the assessment of damages by the prothonotary was made and entered on the same day as the judgment by default without service of the prescribed statutory rule; and on August 30, 1918, the plaintiff answered the defendant's petition, and applied for leave to amend the sheriff's return of service.

(1) It has been held many times that a foreign attachment served on a tenant in possession of defendant's land must contain the specific statement in accordance with the Act of June 13, 1836, Section 49, P. L. 5802, Purdon's 1718, not only that the garnishee was summoned but also that he was in actual possession of the land holding under the defendant.

In *Falk v. Wurzburger*, 3 Kulp 321, President Judge Rice, reviewing the decisions, stated that a service similar to the one before us is so fatally defective that it "must prevent the Court from going a single step further."

In *Bryan v. Trout*, 7 W. N. C. 402, the Supreme Court held that neither the person of the defendant nor his property was before the court by the return of the sheriff, and the entry of judgment against him for want of an appearance was erroneous.

But this is not the only difficulty about the judgment in this case. The plaintiff took a rule "for the prothonotary to assess damages and upon the same day the prothonotary assessed the damages. There is no evidence of service of the rule upon the defendant or upon the garnishee. The taking of such a rule must necessarily involve the fixing of the day and an hour on which the prothonotary will perform his duty under the Act of April 9, Section 1, P. L. 60. The defendant not having entered an appearance, the only method of serving the rule upon the non-resident would be under Rules of Court 38, Section 1:

"All notices shall be in writing. They shall be served upon the party or his attorney in the manner now or hereafter provided by law for the service of writs by the sheriff * * *."

And Section VI:

"Where by these rules notice is directed to be served on the party, and such party does not reside within the county, it shall be sufficient to serve such notice on the bail, agent or attorney of such party; and if such party has no agent or attorney or bail residing in the county, notice may be given by publication for three successive weeks in the paper designated by the Court for the publication of legal notices."

Nor do we find in the files any affidavit, deposition, or notes of testimony presented to the prothonotary. The record should show that the prothonotary assessed the damages "upon evidence produced to him or upon the affidavit of the plaintiff, or some other person cognizant of the transaction." Act April 9, 1870, *supra*. The defendant is, therefore, entitled to have the judgment and the assessment of damages struck off.

2. To prevent the Court from striking off the service the plaintiff has obtained a rule to permit the sheriff to amend his return. The sheriff's return in foreign attachment, as in other cases, may by leave of Court be amended. *Maris v. Schermerhorn*, 3 Wharton 13; *Bank v. Crosby*, 179 Pa. 63; *De Lhoneux v. Pirnay*, 17 W. N. C. 284.

But it has been argued that the sheriff should not in this case be allowed to return lands attached except under the description contained in the writ itself, the plaintiff having directed that the defendant be attached by lands at the corner of Winters avenue and Wayne streets. This direction, though incorporated into the writ, was, in our opinion, mere surplusage. The sheriff going upon the premises and finding that Wayne and Winters avenue are parallel to each other, and that the land to be attached lay at the corner of Winters avenue and Warren streets, might very well in the first instance have returned the particular land according to the fact.

There is considerable force in the argument that the application for this amendment, made on August 30, 1918, long after the return day, and after the defendant had caused a motion to strike off the service to be made, is too late. It seems to us a reasonable argument, based upon the language of Judge Rice already quoted, that the return as made involves not an irregularity but "a fatal defect in the service which must prevent the Court from going a single step further," and in the language of *Bryan v. Trout*, *supra*, that upon such a return "neither the person of the defendant nor his property was before the Court." If the defendant was not before the Court on the return day, can he be brought before the Court after that time by an amendment? We have our doubts about it, but have concluded to give the plaintiff the benefit, as the defendant is a non-resident who has notice of the pending suit at this time and who might be brought into court by a new proceeding. In the interest of a direct and speedy administration of justice, and there being nothing before us to indicate that rights of intervening third persons will be affected, we shall permit the amendment, though not without hesitation.

Rule to strike off judgment and stay of execution is made absolute, but in so far as it is for the striking off of service it is discharged, and the plaintiff's rule to be permitted to amend the sheriff's return is made absolute.

A. H. Jones, for plaintiff.

B. R. Jones, E. J. Gormley, for defendant.

AMERICAN SURETY CO. OF NEW YORK *v.* LYONS *et al.**Surety—Indemnitor—Notice—Manner of*

1. Where a surety company having paid on behalf of one assured, for latter's default on a contract, and seeks to recover from indemnitor, the manner of payment by surety company and the receipt therefor should accompany the statement.
2. Where indemnitor alleges no notice of contract or of default, argument that he executed and delivered contract of indemnity, and, therefore, waived notice, has merit, but plaintiff's statement should reasonably aver such notice.

Common Pleas, Luzerne county. No. 66, March term, 1919.

WOODWARD, J., March 19, 1919.—This case comes before the Court on an affidavit of defense raising questions of law *in limine*. The plaintiff sues to recover the amount paid as surety on the bond of Lyons Brothers given to the United States Government to secure the faithful performance of a contract that the Lyons Brothers had with the post office department for furnishing equipment to the postmaster of Scranton, Pennsylvania, in the way of motor wagons, etc. The plaintiff, when it went upon the bond of Lyons Brothers, required indemnity securing the plaintiff in case it had to make good any default on the contract by Lyons Brothers, and Jacob Groh became the indemnitor of the plaintiff. Lyons Brothers defaulted on their contract, the plaintiff surety company made good the default to the government, and now sues Lyons Brothers and Jacob Groh on their indemnity contract. The point raised by the affidavit of defense is that as to Jacob Groh the indemnity contract was executory and never executed, because Groh had no notice that the surety company had gone on the bond of Lyons Brothers. The wording of the indemnity contract, which is attached to and made a part of the printed form of application made by Lyons Brothers to the American Surety Company to act as surety on their bond is in these words: "Should the American Surety Company of New York, hereinafter called the Surety, execute or procure the execution of the suretyship hereinbefore applied for, or other suretyship in lieu thereof, the undersigned, hereinafter called the indemnitor, do in consideration thereof, jointly and severally undertake and agree," *inter alia*, that they, the indemnitors, will indemnify the surety company for any loss it may sustain. The American Surety Company did go on the bond of Lyons Brothers; Lyons Brothers got the contract from the government and operated under it for sometime before default was made. When default was made the surety company paid the government the amount of its loss, and brought suit against Lyons Brothers and Groh as indemnitors.

It does not appear in the pleadings that Groh had any notice that the surety company had gone on the bond or that Lyons Brothers had received the contract from the government, and the

agreement signed by Groh was conditional on the American Surety Company's going on Lyons Brothers bond to the government. Of course, Lyons Brothers, the other indemnitors sued, had notice, because they could not have got the contract without the bond, but Groh was entitled to notice, because without notice his contract was executory and he might have withdrawn any time before notice.

It is urged by the plaintiff that this contract of the indemnitors differs from the cases cited as authorities by Groh's counsel in that Groh executed the agreement to indemnify the surety company and delivered it without waiting to find out whether the surety company would go upon the bond of Lyons Brothers and thereby waived notice, and there may be merit in this distinction. However, the second point of law raised in the affidavit of defense, to-wit, that the plaintiff alleges in its statement that it paid the government for the default by Lyons Brothers, but does not state the manner of payment, whether by check, and if so, attaching a copy of the check, or by cash, and if so attaching a copy of the receipt, is well taken. We will, therefore, allow the plaintiff to amend its statement by adding thereto, if possible, an allegation that the defendant, Groh, did have notice of the execution of Lyons Brothers' bond to the government by the surety company, and by attaching to the statement the manner of payment by the plaintiff to the government for the loss sustained by the default of Lyons Brothers, and copies of whatever papers show such payment.

B. R. Jones, for plaintiff.
Andrew Hourigan, for defendant.

WOISNEK *v.* BOROUGH OF SUGAR NOTCH.

Boroughs—Change of grade—Damages—Appeal from viewers—Form of issue.

1. Where, in appeal by borough from viewers' assessment of damages from change of grade, form of issue, to which defendant at no time objected, is "what amount of damages has resulted * * * by reason of change of grade, etc." obligation of plaintiff to prove official action of borough in ordering change of grade, or that agreement as to damages had been agreed upon, is obviated.
2. No authority, *supra*, for charging that if changes were incidental to proper paving operation, verdict should be for defendant borough.

Motion for new trial and judgment n. o. v. Common Pleas, Luzerne county. No. 201, July term, 1917.

FULLER, P. J., May 9, 1918.—This was an issue framed on appeal by defendant borough from report of viewers awarding the plaintiff, as property owner, damages in the sum of \$350 for change of grade in the street upon which property abutted.

The appeal states as the sole ground for taking the same "that

the award of damages for the said change of grade of Main street is excessive and above the amount which the borough of Sugar Notch should pay, the aforesaid amount being in excess of the difference in the market value of the land before the change and after the change as affected by the change, as testified to by the witnesses, etc."

The form of the issue, to which no objection has ever been made by the defendant either before, during, or after the trial, was "what amount of damage, if any, has resulted to the property of the plaintiff on Main street in the borough of Sugar Notch referred to in said petition, by reason of the change of grade alleged to have been made by the said borough, as set forth in the petition for appointment of viewers, filed in this proceeding?"

This state of the record seems to obviate any obligation conceding that such obligation would otherwise exist, to prove the matters suggested in defendant's first and fourth points, whose refusal constitutes the first and fourth reasons for a new trial, viz.:

"(1) There being no evidence in this case of any official action of the defendant, by resolution or ordinance, changing the grade of the street in front of the plaintiff's property, this action cannot be maintained in its present form and the plaintiff's remedy should be an action of trespass against the borough according to the course of the common law."

"(4) There is no proof that compensation for the damages has not been agreed upon between the borough and the petitioner."

By the form of appeal and of issue, these preliminaries are implied. The case came to trial with no question involved except the amount of damage, and these reasons, therefore, are overruled.

The second reason is based upon our refusal to charge as requested in defendant's second point: "(2) If the jury believe that the change in front of the plaintiff's property was such a change as was merely incidental to the proper paving of the street, the verdict should be for the defendant."

But we have not been referred to any authority or testimony which would warrant such an instruction, and, therefore, this reason also is overruled.

The third reason, based upon our refusal of defendant's third point, viz.: "(3) Under all the evidence in the case the verdict should be for the defendant," falls with the first and fourth reasons, whereon it is predicated.

The fifth reason, viz., admission of testimony by witness estimating the cost of restoration at \$900 must be overruled, because (1) the testimony was competent as an element of damage to be considered in determining relative value before and after (Patton

v. Philadelphia, 175 Pa., at page 91, and other cases); (2) it did not influence the jury, as shown by the special verdict fixing the damage at only \$625, to which \$75 was added as compensation for delay.

The sixth, seventh and eighth reasons, which complain that the verdict is excessive, cannot be sustained in the light of the evidence.

No doubt the allowance was liberal, but it might have been even more so, as the recital of the testimony in our charge indicates.

The motions are denied, with exception granted to the defendant.

J. H. Finn, T. F. Farrell, for plaintiff.
M. F. McDonald, for defendant.

SUMMARY OF OPINIONS.

In *Cech v. Wonsefsky*, No. 415, October term, 1918, Common Pleas, Luzerne county, Judge Strauss rules, quoting Act March 31, 1905, that landlord seeking to regain possession of premises after lease for one month, must serve written notice, of tenor required in Act March 31, 1905, and that the record must show such compliance; that averment that landlord did thirty days before expiration of the term "demand and require of tenant to leave" the premises is not sufficient. *Sypper v. Czepanski*, 14 Luzerne 1, cited.

In *Riverside Oil Co. v. Cassidy*, No. 69 May term, 1916, Common Pleas, Luzerne county, President Judge Fuller rules that affidavit of defense to suit for gasoline that it was "poor, inferior and uncommercial," unsuitable for the purpose, etc., is insufficient, lacking averment of respect in which it was inefficient; that mere complaint of customer, being hearsay, would not be competent to establish defects; that defects are not adequately averred in the general terms quoted, nor by alleged admission of an agent whose authority is not disclosed.

In *Carr v. Shades*, No. 66, October term, 1917, Common Pleas, Luzerne county, Judge Strauss rules that in agreement with decisions in *Collins v. South Penn Oil Co.* 15 D. R. 468, and *Gregory v. Gregory*, No. 88, July term, 1918, Common Pleas, Luzerne county, a plaintiff in ejectment may be permitted where he has failed to file his abstract of title on or before the return day of the writ and where no injustice would be done defendant, to file said abstract and statement *nunc pro tunc*.

In *Robinson v. Oppenheimer*, No. 694, October term, 1918, Common Pleas, Luzerne county, Judge Strauss reverses proceedings on *certiorari*, where shown that neither transcript nor original summons gives information as to number, street or ward of alderman's office, at which defendant was to appear.

In *Cohen v. Benedict*, No. 253, October term, 1918, suit on book account, Judge Strauss sustains exceptions to *certiorari* where (1) facts averred in petition do not appear in justice's transcript and are not verified by oath; (2) where exceptions are filed only three days before time fixed for argument; (3) where justice having jurisdiction of the parties, *certiorari* on judgment rendered June 24 is delayed to August 2.

WOODMEN OF THE WORLD *v.* RADZEVICH *et al.*

Beneficial societies—Insurance—Mistake of agent—Premium rate—Reduction of death benefit.

Where through mistake of agent of beneficial society in reporting age of applicant for insurance—no fraud or wilful misrepresentation being established on part of applicant—applicant's age is incorrectly given, society cannot avoid the policy, but insured member is charged with knowledge of by-laws, and where he pays for a period a rate for age less than his correct age, though the policy will not be avoided the principal obligation will be reduced in amount to correspond with the rate of premium paid. As where one whose age is reported ten years younger than the fact, and who pays \$14.40 annually instead of \$20.40 annually, the death benefit will be reduced from \$1,000 to \$705.84.

Bill, amendment thereto, answer and replication. Common Pleas, Luzerne county. No. 5, March term, 1918.

STRAUSS, J., September 23, 1918.—January 26, the plaintiff, a fraternal beneficial society, organized under the laws of Nebraska, filed the bill averring that Simon Radzevich, the defendant, had acquired membership in the said society and a benefit certificate from it in the sum of \$1,000, payable upon his death to Catherine Radzevich, his wife, as beneficiary, in consequence of false and fraudulent warranties that the defendant had not had apoplexy or paralysis or any disease of the nervous system, although he had within five years prior to the date of the application been attended and treated by a physician for the serious diseases above named. Because of the fraud averred to have been perpetrated by this false representation, the plaintiff prayed the Court to decree the cancellation of the benefit certificate and the release of the plaintiff from all liability under and by virtue of the contract contained in said certificate.

The answer in general terms denied the perpetration of the fraud and the averments as to false representation.

After a replication had been filed the case came on for trial. The plaintiff then offered no evidence relating to the false representation as to health, but proved that Simon Radzevich was born October 15, 1868, and that the application upon which the benefit certificate issued contained the false statement that he was born October 15, 1878. Thereupon the plaintiff filed an amended bill averring the false representation as to age to have been a fraudulent warranty and renewed the prayer for cancellation of the benefit certificate.

An examination of the record of the trial does not disclose willful misrepresentation by the defendant, Simon, concerning his age. It clearly appears that he, his son Frank, then twenty-one years of age, and his son-in-law, Alec Buchinski, on the same day, to-wit: November 13, 1915, were solicited to become members of the plaintiff by its authorized agent and solicitor, Charles Sha-

cochius, that they all three made application for membership at the same time. This agent, called as a witness by the plaintiff, has no definite knowledge or recollection concerning what was said about the age and birthday of Simon, but believes that he correctly reduced to writing the information then given to him, but testified that he would not say that Simon had declared himself to be forty-seven years of age at the time.

There is inherent evidence in this case tending to establish the fact that defendant did not represent himself to be thirty-seven or give the year of his birthday as 1878. Such a representation in all probability would have called the agent's attention to the probability of mistake, because if he had been born in 1878 he must have been not to exceed sixteen years of age when his son Frank (who also became one of plaintiff's members on that day) was born. The defendant is corroborated in his testimony that he told plaintiff's agent his age was forty-seven by defendant's wife, daughter, and his son, and is not contradicted by anybody. The defendant was unable to read English, in which the application was made, and the paper, though subscribed by him, was not at the time read over to him. He confided in the accuracy and integrity of the plaintiff's agent when he signed the paper.

* * * * *

Whatever comments we may have to make we reserve to be incorporated in answers to requests for findings of fact and law presented by both parties.

DISCUSSION.

Suravitz v. The Prudential Insurance Co., 244 Pa. 582, has summarized the law applicable to conditions such as have been reported in our findings of fact. "In some of the cases cited," that opinion states, after citing a number of decisions, "the covenant was that of warranty, but even in those cases this Court held that where an agent of an insurance company omits a material portion of an answer of the applicant, or incorrectly writes down the answer as made, either intentionally or negligently, in a suit upon the policy, the applicant may show by parol what the real answer was if the application was signed in good faith without having been read, or if the applicant signed without knowledge of the fact that the answer had been incorrectly written down by the agent. These cases were put upon the ground that the fraud or mistake of an insurance agent acting within the scope of his authority will not enable his principal to avoid the policy to the injury of the insured who acted in good faith."

This has been followed frequently. It was quoted in *Carroza v. The National Life Insurance Co.*, 62 Sup. Ct. 163, and commented upon as follows:

"Here, then, is a long and unbroken line of cases which very clearly establishes that in Pennsylvania a plaintiff under the circumstances attending the signing of the application in this case

may, notwithstanding the warranty, or any provision on the subject in the policy, prove by parol that he answered truly, and that in such respects as the application may fail to correctly state the facts, the consequences are to be charged to the fraud or the blunder of the agent, and the company may not escape liability by reason of the alleged breach of warranty."

The question was again before the same court in *Fidelity T. & T. Co. v. The Metropolitan Life Ins. Co.*, 64 Sup. 361, where the Court quoted from *Meyers v. Lebanon Mutual Co.*, 156 Pa. 420:

"The question presented is not whether the terms of the written contract may be varied by oral testimony, but whether an omitted statement may be supplied when the paper from which it was supplied was prepared by the other party to the contract and signed by the person to be affected without reading the paper or having heard it read. Such conduct may show great confidence in the person with whom one is dealing, or want of care on his own part in informing himself of the exact character of the paper signed, but as against the party by whom the fraud or mistake was committed, it does not estop the too careless or too trustful party from alleging the truth."

Therefore the Court held as reported in the syllabus that:

"Where an application for a policy of insurance is declared to be a warranty of the truth of the facts therein stated, if it be filled out by an agent of the company, the plaintiff is not precluded from showing by testimony that either through the fraud or mistake of the agent his answers were not truly recorded, and the company in such cases may not protect itself by reason of such fraud or mistake on the part of its own agent."

In the case before us the defendant was solicited without fraud by the plaintiff's agent to unite himself in membership with the plaintiff, but through a mistake on the agent's part the date of defendant's birth was wrongly inserted in the paper, notwithstanding that correct information had been given by him to the agent.

The facts as set forth in the syllabus of *Carroza v. Life Insurance Co.*, 62 Sup. 153, are exactly the facts here. There, as here, the application was filled out by an agent of the company, through whose mistake the answers of the insured were not truly recorded. The insured was an illiterate foreigner, unable to read English and the application was not read to him.

We can see no difference in the application of these principles between a controversy in which a life insurance company is plaintiff or defendant and one in which a beneficial association organized or incorporated under the law (in this case in the State of Nebraska) is a plaintiff or defendant, the other party being an individual or beneficiary claiming the protection of a life insur-

ance contract. The Sovereign Camp of the Woodmen of the World is a beneficial society. The by-laws which have been put in evidence show that "this corporation shall be known as the Sovereign Camp of the Woodmen of the World, and shall be composed of the Sovereign Camp, beneficiary head camps, and camps. The Sovereign Camp organized in the city of Pittston a camp known as Lithuanian Camp No. 382. Shacocius, the witness, was a solicitor appointed either by the Sovereign or the Lithuanian Camp, and as such obtained the application of this defendant. He was clearly the agent of the plaintiff and it was his error which produced the misstatement in the application.

There is only one phase of the question concerning which we have any doubt. During the defendant's membership in the association he paid for account of his beneficiary certificate at the rate of \$14.40 per annum, which was the payment required from one who becomes a member at the age of thirty-seven instead of \$20.40, which was the payment required at the age of forty-seven. In other words, he paid twelve-seventeenths of the amount that he ought to have paid. The statute of this State relating to life insurance provides that "if the age of the insured has been misstated, the amount payable under the policy shall be such as the premium would have purchased at the correct age." Act of June 1, 1911, Section 25, P. L. 581.

The application signed by the defendant contains the clause "that the liability of the Sovereign Camp for the payment of benefits shall not begin until after this application shall have been accepted by the sovereign physician and a beneficiary certificate issued thereon and personally delivered to me." Thus the approval of the application necessary to be obtained before the beneficiary certificate would be issued was to be obtained from officials of the plaintiff, who were guided entirely by the writing itself. While undoubtedly and logically the solicitor's blunder was imputable to the plaintiff and its higher officers, yet it is a fact that from the delivery of the certificate whereby the defendant's membership in the organization was completed down to the discovery of the error by the plaintiff, the defendant is chargeable by virtue of his membership with knowledge of the by-laws. It became his duty to make the full payments that were required and to acquaint himself with the requirements of the by-law.

It therefore seems to us that it would not be a just disposition if we were to allow the defendant to hold the beneficiary certificate for \$1,000, upon condition that he shall pay to the plaintiff the difference between \$14.40 and \$20.40 per year, in order to make up the shortage of actual dues demandable from him at the age of forty-seven. Instead of this it seems to us that it will be administering a more exact justice to follow the analogy of the statute applicable to life insurance, although there is no similar regulation of beneficial societies. The defendant paid twelve-

seventeenths of the dues that he ought to have paid and therefore five-seventeenths of this beneficial certificate should be cancelled and the certificate be decreed to stand for the payment of \$705.84, payments by the defendant to continue at \$14.40 per year in monthly instalments, subject, however, to such changes in the constitution and by-laws of the organization as may hereafter be made.

We report the following

CONCLUSIONS OF LAW:

First. "The plaintiff society, under the pleadings, is a fraternal beneficial society, organized under the laws of the State of Nebraska, and authorized to do business in Pennsylvania." (Plaintiff's first request for conclusion of law affirmed.)

Second. "The application by Simon Radzevich for membership in said Sovereign Camp of the Woodmen of the World, designated as 'Plaintiff's Exhibits D and A' in the evidence, are a part of the contract of membership and competent evidence for the society to show breach of warranties of facts made by applicant in procuring membership in said society." (Plaintiff's second request for conclusion of law affirmed.)

Third. The benefit certificate of Simon Radzevich, Exhibit B, was not issued in pursuance of the warranties contained in application, "Exhibit A." (Defendant's third request for conclusion of law denied. Mem.—The request as drawn is open to the criticism that it is not a request for a conclusion of law but for a finding of fact.)

Fourth. The statement of age made by Simon Radzevich was intended to be a warranty but having been erroneously reduced to writing in "Exhibit A" it did not constitute in this form a warranty nor justify a decree in favor of the plaintiff upon the prayers of this bill. (Plaintiff's fourth request for conclusion of law is denied, said request reading as follows: "The statement of age made by the said Simon Radzevich and contained in application, 'Exhibit A', was a warranty of age to the society and in reliance upon the truth of said warranty, as well as answers to medical examination contained in said application, the certificate was issued.")

Fifth. Plaintiff's sixth request for conclusion of law is refused, and in lieu thereof we report the following: The beneficiary certificate of the said Simon Radzevich, because of the erroneous statement as to age contained in the written and printed application, is under the circumstances of this case void as to five-seventeenths of the amount for which it was issued, and as to that the plaintiff is entitled to relief in equity by cancellation and surrender of the certificate for endorsement thereon of such cancellation, or for the issuing of a new certificate in the sum of \$705.84 in lieu thereof.

(In so far as defendant's first request for conclusion of law is inconsistent with this, it is refused, said request being as follows: "That under all the evidence the beneficiary certificate issued by plaintiff to Simon Radzevich, one of the defendants, is a valid and subsisting contract in law and should not be cancelled.")

Sixth. "That even in the case of a warranty where the agent of an insurance company omits a material portion of an answer of the applicant, or incorrectly writes down the answer as made, either intentionally or negligently, in a suit upon the policy, the applicant may show by parol what the real answer was, if the application was signed in good faith without having been read, or if the applicant signed without knowledge of the fact that the answer had been incorrectly written down by the agent." (Defendants' second request for conclusion of law affirmed.)

Seventh. Under the pleadings and evidence in this case, the beneficiary certificate or contract herein referred to should be reformed and enforced as nearly as may be in accordance with the real agreement between the parties thereto; that is to say, for twelve-seventeenths of the amount for which it is issued. (Defendant's third request for conclusion of law is so far as it is inconsistent with this finding is refused.)

We refuse to affirm plaintiff's fifth request for conclusion of law, said request reading as follows: "The statement of age made by the said Simon Radzevich being admittedly false and relating to a matter material to the risk, the certificate is void by its very terms."

DECREE *NISI*.

Now, September 23, 1918, the prothonotary is directed to file the adjudication together with findings of fact and law accompanying this order, and thereupon to enter a decree *nisi* as follows:

This cause came on to be heard at this term and was argued by counsel and upon consideration thereof, it is ordered, adjudged and decreed that the beneficiary certificate outstanding in the hands of the defendant shall be filed in this case for surrender to the plaintiff and for cancellation and shall be delivered to said plaintiff after the plaintiff shall have filed in this court a beneficiary certificate for \$705.84, being twelve-seventeenths of \$1,000; the amount of said original certificate payable to the same beneficiary as the original and upon the same conditions; and that upon the filing of such new certificate by the plaintiff, it shall be delivered by the prothonotary to the defendant; neither party in this case shall file a bill of costs or shall be entitled to recover costs against the other.

G. R. McLean, F. W. Lidstone, for plaintiff.

L. J. Schwartzkopf, W. L. Pace, for defendants.

FARRELL *et al* v. PENNSYLVANIA COAL CO.

Non pros.—Laches—Statute of limitations.

Rule for *non pros.* might reasonably be granted, in analogy with the statute of limitations after five and a half years inaction after suit brought and seven years after cause. But the principle of flat adoption of analogy is not in vogue and explanation of continued illness of plaintiff's attorney would operate to discharge rule for *non pros.*

Rule to show cause why the record should not be corrected, plaintiffs' statement stricken off, and non pros. entered. Common Pleas, Luzerne county. No. 189, October term, 1912.

FULLER, P. J., March 28, 1919.—This suit was brought June 17, 1912, on a cause of action which upon the plaintiffs' own admission accrued at least as early as February 14, 1911.

No statement was filed, nor any other step whatever taken by the plaintiffs, until they were aroused by defendant's motion for *non pros.* on the ground of abandonment resulting from such procrastination.

Two rules have been taken to show cause why *non pros.* should not be entered; one on December 5, 1917, the other on May 18, 1918, whereof the latter is now under consideration.

In response to the first rule, the plaintiffs brought into Court in January, 1918, an offer to file a statement, which on argument of the rule came into the hands of one of the judges and by him was turned over to the prothonotary with an opinion discharging the rule on March 18, 1918.

The salient portion of the opinion is the following:

"No definite rule has been stated that is uniformly applicable to every case where a *non pros.* is asked for delay in filing the statement. The nearest approach to such a rule is that the statement shall be filed within a period after the bringing of the suit not longer than the period of the statute of limitations applicable to the case. *Noonan v. Pardee*, 200 Pa. 474, establishes the principle that in cases of this character the period of the statute is six years, and applying that doctrine the plaintiff ought to be permitted to file a statement which he has presented to the Court."

By some harmless oversight, the statement was not actually marked filed until May 10, 1918, when it was marked "filed March 18, 1918."

Then the present rule was taken for entry of *non pros.*, embracing also a rule to show cause why the record should not be

corrected as to the date of filing the statement, and why the latter should not be stricken off as defective and insufficient.

By order of June 26, 1918, the Court directed the entry of a note upon the record, in the nature of an explanation or correction concerning the statement, and further directed that the entire proceeding be submitted to the Court in banc.

The record in respect to the filing of the statement having been set straight, and that dispute not being of any material consequence in any event, we have before us only the rule to strike off the statement on the ground of being defective and insufficient, and the rule, amounting to merely a renewal of the original rule, to enter a *non pros*.

The statement certainly exhibits a maximum of generality with a minimum of specific information, but this infirmity is curable by a bill of particulars, and other infirmities might be demurrable, but we fail to find any ground internal or external for striking it off.

This leaves the rule for *non pros*. on its naked merits the same as on the original application, with the addition, however, of depositions since taken explanatory of the delay.

The learned judge who discharged the original rule based his decision upon analogy of the statute of limitations, which, on the cause of action divulged in the belated statement, would be six years, with a bare margin of six months left, reckoning from the date of suit, but with an overdraft of ten months reckoning from the cause itself.

This flat adoption of analogy to the statute of limitations as the governing principle in motions of this kind, is opposed to other decisions of this Court, and has not been adopted by the Court in banc.

The original rule might have been made absolute on the *prima facie* showing at that time, viz., absolute inaction of the plaintiffs for five and one-half years after suit and almost seven years after cause.

A presumption of abandonment may arise from such delay, if unexplained, just as persuasively as from a further delay of six months.

On the present rule, however, depositions were taken which disclose an explanation, namely, the severe and long continued illness of the plaintiffs' attorney for a period of several years after institution of the suit.

We feel justified in accepting this explanation, and on strength thereof we discharge the rule, thus avoiding at least for the present any appearance of inconsistency with our other decisions.

The rule is discharged.

J. T. Lenahan, C. B. Lenahan, for plaintiffs.
John McGahren, for defendant.

WILLIAMS *v.* KOCHER.

*Landlord's warrant—Distress for rent—Discretion of constable—
Mandamus.*

Acceptance by constable of warrant to distrain goods for rent, predicates no statutory duty on him to proceed, but he may at discretion refuse. Plaintiff is thus deprived of no legal right but may employ another as bailiff. Mandamus to compel constable to proceed with levy and appraisement and sale will be refused, where constable with warrant to distrain goods received information that another owned by virtue of constable's sale the goods to be levied upon, and who thereupon returned the warrant to plaintiff.

Petition for alternative mandamus, answer and demurrer. Common Pleas, Luzerne county. No. 468, October term, 1918.

STRAUSS, J., December 30, 1918.—The petition averred that the plaintiff had put into the hands of the defendant, a duly qualified constable of White Haven borough, a landlord's warrant authorizing the defendant to distrain the goods of one Fred Sipler for arrears of rent which had accrued for certain premises described in the warrant; that the defendant had duly levied, but had failed, neglected and refused to have an appraisement made and make a sale under the warrant, and had refused to proceed further with the warrant; that the goods levied upon consist of ice, which was being consumed and dissipated unless the defendant performed his duty as constable in the premises; wherefore a mandamus was prayed for directing the defendant to proceed under said warrant as he is by law required to do.

The defendant answered admitting that the warrant had been put into his hands, but that he had been informed by Harry Forsey, who held possession of the ice, which the said landlord intended to have the defendant distrain, that he, the said Forsey, owned the said ice by virtue of a constable's sale; whereupon, the answer avers, the defendant took legal advice and refused to make any levy on said landlord's warrant and returned the said warrant to the plaintiff, informing him that he, the defendant, refused to serve the warrant, and further averred that it was not his (defendant's) duty to make a levy and distress under said warrant.

To this answer the plaintiff demurs: (1) Because the respondent admits accepting the warrant and failure to proceed as directed by law; (2) that respondent does not aver that said warrant was returned with the consent of the relator; nor (3) the

time when the warrant was returned. These, though not all the reasons set out as basis for the demurrer, are sufficient to enable us to consider all the material aspects of the case.

Under the Act of March 21, 1872, no duty is imposed upon the constable in connection with the service of a landlord's warrant until five days have elapsed after distress taken. The first section of that Act provides that "where any goods or chattels shall be distrained for any rent reserved and due upon any premises, lease or contract, whatsoever, and the tenant or owner of the goods so distrained shall not within five days next after such distress taken and notice thereof with the cause of such taking left at the mansion house or other most notorious place on the premises charged with the rent distrained for replevy the same * * * the person distraining shall and may, with the sheriff, undersheriff, or any constable in the city or county where such distress shall be taken (who are hereby required to be aiding and assisting therein) cause the goods and chattels therein distrained to be appraised * * * and after appraisement, after six days public notice, should lawfully sell the goods and chattels distrained for the best price that can be gotten for the same, etc."

Under the seventh section of the Act, the landlord or his bailiff * * * or other person empowered by him, may take and seize as distress for rent or arrears personal property upon the premises.

The acceptance of the warrant by this defendant for purposes of making the levy was not in pursuance of any requirement of the statute, but simply under his personal right to become the landlord's bailiff or agent for distraining the property. He had the right to determine whether he would act as bailiff, and at his discretion to refuse to act, and therefore for any reasons satisfactory to himself to return the warrant to the plaintiff; and thereupon the plaintiff had the right to appoint some other bailiff or to make the distress himself. By defendant's refusal to distrain the plaintiff was not deprived of any legal right nor did the defendant refuse to perform any duty which the statute had placed upon him.

The demurrer admits the averment that the landlord's warrant was returned to the plaintiff, and that the defendant informed the plaintiff that he had not distrained and that he would refuse to do so. Judgment for defendant on demurrer.

Judgment in favor of the defendant upon the demurrer, and the petition for mandamus dismissed.

C. F. Wharen, for plaintiff.
E. J. Moore, for defendant.

LLOYD v. NEW JERSEY FIRE INS. CO.

Insurance—Fire—Ratification of policy—Estoppel.

In suit against fire insurance company facts as to ratification of policy and estoppel must be unequivocally established to justify binding instructions and to hold defendant under the policy in suit.

Motion for new trial and for judgment non obstante veredicto. Common Pleas Luzerne county. No. 2238, October term, 1914.

FULLER, P. J., 1917.—This case involves three questions, viz.:

(1) Whether without the aid of certain circumstances claimed to constitute ratification or to create an estoppel, the defendant would be bound by the policy in suit.

(2) If not so bound, whether in fact any circumstances existed which in law would constitute ratification or create an estoppel binding the defendant upon the policy.

(3) Whether upon the assumption of being bound on one or the other of these alternatives the defendant should have the benefit of apportionment with the other policy for which the policy in suit was substituted.

Upon conclusion of plaintiff's testimony, the defendant offered none, and both parties requested binding instructions.

Thereby, it seemed to us that the defendant definitively admitted every fact and every reasonable inference of fact deducible from the plaintiff's testimony, including those which bore upon the question of ratification and estoppel.

As the general legal aspect of the case seemed to be nearly balanced between the parties, we naturally gave the benefit of all doubts to the insured, and directed a verdict in favor of the plaintiffs.

Now we have come to the following conclusions:

(1) Without the aid of subsequent ratification and estoppel, the defendant would not be bound by the policy in suit.

(2) The evidence disclosed certain circumstances which might in law establish ratification or estoppel, for example, payment of premium and visitation of adjuster, but should have been submitted to the jury for determination in fact notwithstanding the defendant's request for binding instructions. Of course that request admitted for the sake of the argument every fact and reasonable inference of fact deducible from the testimony, pre-

cisely as same as a motion for non-suit, but its refusal still left the case submissible to the jury on every matter of fact not established so unequivocally as to justify binding instructions.

(3) The facts were not established so unequivocally as to justify binding instructions.

(4) The claim for apportionment does not require present consideration.

(5) A new trial is granted.

(6) The motion for judgment *n. o. v.* is denied.

J. Q. Creveling, for plaintiff.

C. B. Lenahan, for defendant.

CENTRAL POOR DISTRICT, LUZERNE CO. v. WILDONER.

Lease and sale of land—Timber rights—Injunction—Merger.

1. Where land is acquired under lease, with right to cut timber for repairs and maintenance, but not for purposes of sale, and sale of timber was effected during term of lease, with present right of entry, and sale in fee to lessor followed, deed reciting that rights and privileges of lease were not merged in the ownership—
2. Injunction will lie to prevent cutting of timber during life of the lease. Merger denied on ground of expressed intention and infliction of injury.

Trial on injunction bill, answer and replication. Common Pleas, Luzerne county. In Equity. No. 1, July term, 1918.

FULLER, P. J., August 29, 1918.—By this sworn injunction bill, filed May 9, 1918, the plaintiff seeks to prevent the cutting of timber upon its land by the defendant, who in his sworn answer, filed May 18, 1918, claims the right so to do under grant of the timber from plaintiff's predecessor in title.

A preliminary injunction was duly granted and is still operative.

The answer attacks the jurisdiction of equity on the ground of an adequate remedy at law, but the point has not been urged and we decide without difficulty, *in limine*, that we have jurisdiction.

THE FACTS

established by pleadings and proofs, undisputed and succinctly stated, are these:

1. The land consists of about 640 acres, in part covered with timber and in part cleared, situate in Hunlock township, said county, accessible and suitable for the purposes of the plaintiff, who is duly incorporated as the Central Poor District of Luzerne county.

2. By written instrument dated April 19, 1913, this land was leased by its owners to the plaintiff, "for the purposes of farming,

grazing cattle, raising poultry and the like, for the term of five years from April 1, 1913, with the option of renewal for an additional term of five years from April 1, 1918.

The instrument expressly granted to plaintiff, "the right to cut timber and trees from the premises to be used for fences and other necessary improvements upon the premises, but not to cut timber or trees for the purpose of sale."

The instrument also expressly reserved to the owners the right of entry for the purpose of exploring, developing and mining coal or other minerals in the possible event of such being found upon the premises, but contained no other restriction upon the complete dominion of plaintiff as lessee.

The plaintiff went into immediate possession, which it still maintains.

3. By written instrument dated May 5, 1914, the said owners sold all the timber upon the land to certain persons, who, by instrument dated April 29, 1916, transferred their rights to the plaintiff.

This instrument expressly recites that the purchasers of the timber "accept notice of the existing lease to the Central Poor District of Luzerne county of the identical tract of land, etc., etc." It also expressly provides that the timber shall be removed before May 5, 1919, with extension of time for such period as by reason of said lease they should be deterred or delayed in removing the timber.

4. The plaintiff, by formal action in November, 1917, exercised the said option of renewal, thus extending the term of the lease until April 1, 1923.

5. The defendant, early in 1918, on assumption of his right under the instrument of sale aforesaid, entered upon the land for the purpose of cutting and removing the timber, actually did cut and remove a certain quantity before the preliminary injunction, and intends, if not enjoined, to continue this course.

6. By deed dated April 2, 1918, the said owners conveyed the land to the plaintiff in fee.

This deed expressly recites the lease and provides that "all the rights, privileges, benefits, terms and conditions of the said lease are hereby impressed upon the grantee herein".

The title was thus acquired and said provision was inserted, in pursuance of corporate action by the plaintiff in a certain resolution duly adopted March 21, 1918, and reciting: "The said land being taken and accepted on condition that the rights and privileges to this district under the lease expiring April 1, 1923, shall not be merged into the ownership."

A merger might inflict injury upon the plaintiff, first by destroying its limited timber rights under the lease, and, second, by hastening the defendant's right to cut the timber within the time fixed by the extended term of the lease.

The defendant claims a merger, which would give him present right to cut the timber.

The plaintiff denies a merger on the double ground of injury and expressed intention.

This contention states the entire controversy.

If there was a merger, the injunction should be dissolved and the bill dismissed; if not, the injunction should be continued until April 1, 1923.

The parties are agreed upon this definition of the issue.

We state the following conclusions of

LAW:

1. By the lease plaintiff acquired over the land the entire dominion which ordinarily appertains to a lessee, during the entire time as extended until April 1, 1923, and also acquired the right during that time to cut timber for the purposes specified in the lease.

2. These rights could not be legally disturbed by the subsequent sale of the timber.

3. They would be disturbed in fact by the defendant's proposal to cut the timber during the said time.

4. The defendant should be enjoined from such proposal unless those rights under the lease were lost by merger under the deed.

5. There was no merger under the deed and hence the rights were not lost, because such a result is prevented by express intention and by infliction of injury.

6. The preliminary injunction should therefore be continued and decree *nisi* to that effect should be entered.

We have not elaborated the foregoing conclusions of law because upon the controlling subject of merger we have been referred by the defendant to no authority which qualifies the general preventive principle applicable to the facts of the case.

While we continue the injunction, however, we suggest that the parties might in a friendly spirit of mutual consideration agree upon an arrangement which will enable the defendant to remove the timber without delay to himself, and without substantial injury to the plaintiff.

We hope that this will be done.

The Prothonotary will enter and give notice of the following

DECREE NISI:

Ordered, adjudged and decreed that the preliminary injunction heretofore granted be continued until April 1, 1923, unless the necessity of the same be obviated by circumstances hereafter occurring; and that each party pay its own costs.

C. E. Keck, for plaintiff.

B. W. Davis, for defendant.

PHILADELPHIA & READING Rwy. Co. v. BOND.

Common carriers—Suit for freight charges—Statement—Privity of contract—Burden of proof—Sale of freight by railroad.

1. Where a railroad company sues for carriage charges on freight, said freight received from another railroad, and relies upon a written contract in which it has privity, but of which it is not a direct party, brief statement required by Practice Act is not sufficient to show plaintiff's right to recover unless there is averment showing how the privity of contract arises,—and defendant will be within his rights in denying a contract with plaintiff.
2. Where plaintiff is not a party to bill of lading he will have the burden of proving that he is entitled, as privy to the contract, to recover.
3. A railroad, following analogy, where it avers right to recover a certain sum for freight carriage after admitting that it has sold the shipment should set forth in statement the facts justifying the sale.

Motion for judgment on affidavit of defense and exceptions thereto. Common Pleas, Luzerne county. No. 1623, October term, 1914.

STRAUSS, J., October 26, 1917.—The plaintiff's statement demands \$87.26, with interest from February 12, 1913, for freight, car service, advertising expenses and unloading charges as the result of a transaction in which it is averred that "on or about February 12, 1913, the defendant shipped a carload of poles from Creasy, Pa., to one B. M. Arthur at St. Nicholas, Pa., over plaintiff's railroad, said car being owned by plaintiff," for which shipment "a bill of lading was duly given by the plaintiff to the defendant," whereby the said Bond "agreed to pay the freight and all other lawful charges accruing on said property (the poles) so that the defendant then and there became liable for freight charges and demurrage on said shipment;" that the consignee, Arthur, refused to receive the poles" so that it became necessary for the plaintiff to sell the same in accordance with the statute in such cases made and provided," which was done after due and legal notice, the amount realized from said sale being one dollar, which was applied upon the plaintiff's debt. The bill of lading is filed and made part of the statement.

On June 29, 1917, the defendant filed an affidavit of defense in which he denied having made any contract with the plaintiff or having directed any shipment to be made in plaintiff's car or over plaintiff's road, but averred that he had made such contract for shipment with the Pennsylvania Railroad, a different corporation and person; he further denied that he had ever received a bill of lading from the plaintiff, that he had agreed to pay the plaintiff any freight or other charges; that it became necessary for the plaintiff to sell the carload of poles or that the same were sold according to law, but that he is "informed and expects to be able to prove by valid, legal evidence at the trial, if it becomes material that the reason why the poles were not accepted by the consignee

was because of unreasonable delay and delivery by the carrier beyond the time it was agreed said poles should be delivered, and that said poles were not, in fact, sold in accordance with the statute in such cases made and provided; that "the alleged public auction at which the said poles were alleged to have been sold was not a legal sale whatever, was not in accordance with any statute or law permitting same but constitutes a trespass and unlawful conversion by plaintiff of the carload of telegraph poles, property of the defendant, of the value of \$188, whereby and because of which the defendant has been put to great damage."

On July 13, on behalf of the plaintiff, exceptions to the affidavit were filed and the rule now under consideration was obtained on the ground that the affidavit is evasive in that:

(1) and (2). It does not deny that the defendant shipped a carload of poles over the plaintiff's railroad, or that the owner of the poles agreed to pay the freight, etc., because the averment in the affidavit that the dealings were with the Pennsylvania Railroad, a different corporation, is not accompanied by a denial that the receiving carrier, to-wit: the Pennsylvania Railroad, was not the forwarding agent of the plaintiff, the bill of lading, now part of the pleadings, showing delivery to the Pennsylvania Railroad Company.

(3) The statement having attached to it the bill of lading issued by the Pennsylvania Railroad Company, *ipso facto* as a result of the clauses in the bill of lading fixes the liability of the defendant, and in this exception certain clauses in the bill of lading are referred to, and the issuing of the bill of lading not being denied the affidavit is insufficient.

(4) The affidavit does not show in what way the sale of the carload of poles was not legal or in accordance with the statute.

(1), (2) and (3) We are of the opinion that with the statement in its present form the affidavit of defense is sufficient. It is clear from an examination of the statement and the bill of lading that no contract between the plaintiff and the defendant has been sufficiently averred, and that the denials of the defendant contained in the affidavit of defense are sustained by the statement. Without other knowledge than that which is obtainable from the statement, it does not appear that the defendant has any contract relations with the plaintiff.

There is no doubt of the fact that the defendant delivered to the Pennsylvania Railroad at Creasy on February 11, 1913, the carload of poles consigned to B. M. Arthur at St. Nicholas, Pa., which the Pennsylvania Railroad "agreed to carry to its usual place of delivery at said destination if on its road; otherwise to deliver to another carrier on the route to said destination." It follows from this that we must presume that the Pennsylvania Railroad's line extended to Creasy, Pa., and that said road also

extends to the destination, to-wit, St. Nicholas, Pa., unless the statement contains an averment that St. Nicholas, Pa., was not on the Pennsylvania Railroad; and that, therefore, at some point short of the destination, the Pennsylvania Railroad, in accordance with the terms of the bill of lading delivered the poles to the plaintiff, who was "another carrier on the route to said destination." Such an averment is essential to make apparent a privity of contract under the bill of lading between this plaintiff and the defendant. Unless such an averment were contained in the statement it would not be incumbent upon the defendant to deny it, and for this reason the defendant had the right to ignore the second clause of the conditions printed on the back of the bill of lading, which provided that "in issuing this bill of lading this company agrees to transport only over its own line, and, except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line," and also that portion of Section 3 of the conditions under which the Pennsylvania Railroad, being the carrier to whom the goods were delivered, had "the right, in case of physical necessity, to forward said property by any railroad or route between the point of shipment and the point of destination."

To state what we consider in a case like this to be the duty of the plaintiff when drawing a statement under the Practice Act of 1915, we would say: Where the plaintiff relies upon a written contract in which he has privity but of which he is not a direct party, the brief statement required by the Act is not sufficient to show his right to recover unless there is averment showing how the privity of contract arises, and the defendant will be entirely within his rights if by the affidavit of defense he denies having made a contract with the plaintiff. The Practice Act lays down the same rule of pleading for both plaintiff and defendant in that it provides "the statement of claim shall be as brief as the nature of the case will admit," Sec. 9, P. L. 484, and "the affidavit of defense shall be as brief as the nature of the case will admit."

Generally speaking, the party upon whom the burden of proof lies to make out a particular condition before he can maintain either his action or his defense, must aver the existence of that condition in his own pleading. In this case at the trial the plaintiff not being a party to the bill of lading, will have the burden of proving that it is entitled as privy to the contract to recover under the terms of the bill of lading because the poles were delivered to it by the initial carrier to be forwarded to the destination, and, therefore, will have the burden of averring it.

(4) Evidently the plaintiff sold these poles because it claimed that the defendant had in some way made himself liable to summary statutory proceedings and remedies created for the plaintiff's protection, not according to the course of the common law.

We incline to the opinion that just as the records of a justice of the peace in summary convictions must be specific in all essential matters relating to jurisdiction and the power to enter summary judgment, and that the fundamentals of the jurisdiction must be set forth in the record, so a railroad company, when plaintiff, if it avers its right to receive a certain sum for freight after admitting that it had sold the shipments, should set out in the statement in detail the facts justifying the sale. In this case the statement merely avers: "The consignee, B. M. Arthur, refused to receive the poles aforesaid, and so it became necessary for the plaintiff to sell the same in accordance with the statute in such cases made and provided. After due and legal notice was given such sale was advertised, the poles were sold at public auction and the amount realized from said sale was one dollar, which was applied to the debt aforesaid."

The affidavit of defense meets this averment as follows: "Defendant denies the statement contained in the fifth paragraph, that it became necessary for the plaintiff to sell the carload of poles or that the same was sold according to law; and defendant further says that he is informed and expects to be able to prove by valid, legal evidence at the trial, if it became necessary, that the reason why the poles were not accepted by the consignee was because of unreasonable delay and delivery by the carrier beyond the time when it was agreed that said poles should be delivered, and that said poles were not in fact sold in accordance with the statute in such cases made and provided * * * and further says that he is informed and expects to be able to prove by valid, legal evidence at the trial that the alleged public auction at which said poles were alleged to have been sold, was not a legal sale whatever, and was not in accordance with any statute or law permitting the same, but constitutes a trespass and an unlawful conversion by the plaintiff of the carload of telegraph poles, property of the defendant, of the value of \$188, whereby and because of which the defendant has been put to great damage."

As we have said with reference to plaintiff's right as a forwarder, because at the trial the plaintiff would have the burden of proving the several prerequisites for the valid selling, we are of the opinion that the statement which does not set out the several prerequisites as they were observed, but merely avers a sale "in accordance with the statute" which confers special rights and privileges upon the plaintiff, is sufficiently met by as brief an averment in the affidavit of defense that the sale was not in accordance with the statute.

Now, October 26, 1917, the rule granted July 13, 1917, to show cause why judgment shall not be entered for want of a sufficient affidavit of defense is discharged.

G. S. McClintock, for plaintiff.
P. J. Sherwood, for defendant.

PJATNIK *et al.* v. KOSCELANSKI *et al.*

Beneficial societies—Designation of beneficiaries—Equitable claim outside limitation of Act 1893.

Where one insured in beneficial society, operating under Act April 6, 1893, P. L. 7, designates as beneficiaries a first cousin and (presumably) her husband for \$500 share, and another, not entitled under limitations of said Act, for \$500, with no designation of brother and sister next of kin and heirs at law—

Held, That designation of first cousin on consideration of a home and care to insured while sick and unable to work, is valid for \$250, the husband having no claim on the \$500 apparently intended for division between them.

(2) Designation of another for \$500 on evidence of agreement for that amount, in consideration of the other paying dues for disabled member, 1902-1917, and giving him work, etc., even though that other does not fall within designation of beneficiaries of Act 1893, is supported by every claim of justice and equity, and will be allowed. *Shumega v. First C. S. U.*, 61 Superior, 126, cited.

(3) Remainder of death benefit, \$250, goes to next of kin.

Case stated on feigned issue in interpleader to determine ownership of death benefit in beneficial association. Common Pleas Luzerne county. No. 414, November term, 1916.

FULLER, P. J., 1917.—This case involves the ownership of the death benefit amounting to \$1,000, payable on the death of one George Fedorak, a member of the Pennsylvania Slovak Roman and Greek Catholic Union, a beneficial society of this State, claimed on the one hand by Joseph Pjatnik, Anna Pjatnik and Joseph Svarc (or Schwartz) hereinafter called Joseph Schwartz, the designated beneficiaries of the deceased, and on the other hand by Elizabeth Koscelanski and Andrew Fedorak, his heirs under the intestate law, the money having been paid into court by the society, an interpleader having been ordered, an issue framed, and this case stated having been agreed upon to determine the respective rights of the said rival claimants, with the said designated beneficiaries as plaintiffs and the said heirs as defendants.

The specific question submitted is the following:

“Are the designations made by said George Fedorak, deceased member of said Union, of said plaintiffs, or any of them, as the beneficiaries of said fund paid into court, or any part thereof, valid as against said defendants?”

The question is further defined thus:

“(a) If the Court deems all of the designations valid, judgment to be entered in favor of the plaintiffs for the whole amount, \$1,000; (b) if the Court deems the designations in favor of Joseph Pjatnik and Anna Pjatnik valid, but in favor of Joseph Schwartz invalid, judgment to be entered in favor of the Pjatniks for \$500 and in favor of the defendants for \$500; (c) if the

Court deems only the designation in favor of Anna Pjatnik valid, and in favor of Joseph Pjatnik and Joseph Schwartz invalid, judgment to be entered in favor of Anna Pjatnik for \$250 and in favor of the defendants for \$750."

The foregoing definition of the question seems to assume the validity of the designation in favor of Anna Pjatnik, and not to contemplate any alternative of sustaining the designations in favor of both Anna Pjatnik and of Joseph Schwartz, but this alternative is embraced by the form of the question itself and will therefore be considered.

We make our own statement of the case and conclusions thereon as follows:

1. George Fedorcak was a member in good standing of the Pennsylvania Slovak Roman and Greek Catholic Union, a beneficial society of this State, and upon his death, November 4, 1915, there became payable as death benefits by virtue of his membership the sum of \$1,000.

It appears by indirection from the case stated, that his membership was evidenced by a certificate or policy, but the fact is not expressly averred nor is any copy of such an instrument furnished, and so our decision must be independent of the written contract if one existed.

2. The said society was incorporated under the laws of this State, July 29, 1893, and is therefore subject to the Act of April 6, 1893, P. L. 7, "defining fraternal, beneficial and relief societies", etc., which provides *inter alia*, "that the payment of death benefits shall be to families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon the member."

By-laws of the society provide:

"Sec. 11. Within sixty days after the death of a member in good standing, * * * his designated beneficiary or his legal representative shall receive \$1,000," etc.

"Sec. 15. Member must leave his death benefit to his family only, his heirs, wife of, person or persons dependent upon him in such proportion as he may see fit."

The case stated does not bring the society within any of the exempting provisos which the Act contains.

3. By virtue of said Act, as judicially construed, and also of said by-laws, the said sum would go and belong, first, to the member's lawfully designated beneficiaries, if any, and if none, to his heirs under the intestate law.

4. The plaintiffs in the issue, make claim to the money under certain written designations by the member; and the defendants in the issue, disputing the validity of those designations on the ground of transgressing the specified restrictions of the statute and by-law, make claim to the money as next of kin and heirs under the intestate law.

The heirs brought suit against the society, the latter paid the money into court, and an interpleader was allowed which now comes to us for decision as above stated.

5. The defendants in the case stated are respectively brother and sister, next of kin and heirs at law of the member, entitled to the money if he had made no valid designation, and if they have standing to dispute.

6. The claim of Joseph Pjatnik and Anna Pjatnik is founded (1) upon a written assignment bearing date August 23, 1915, whereby the said member, "in consideration of the sum of one hundred dollars and the care to be taking of me while sick and unable to work," sold and assigned to them the sum of five hundred dollars (\$500) or one-half of the "within policy of insurance"; (2) upon a written designation bearing the same date, whereby he disposed of his death benefit as follows:

"Joseph and Anna Pjatnik, cousin, five hundred dollars (\$500), Joseph Svarc five hundred dollars (\$500)", and directed payment to them as his designated beneficiaries; (3) upon the actual rendition of the consideration recited in the assignment, to-wit, while the member was sick and unable to work the two Pjatniks "took him into their home and took care of him."

Anna Pjatnik was a blood relative, being a first cousin of the member, and the designation as to her should be sustained on that ground independent of other considerations, as seems to be taken for granted.

Joseph Pjatnik was not a blood relative, nor embraced within any of the legal restrictions, and while we might infer that he was the husband of Anna, the fact is not stated, nor perhaps material.

It may be noted in this connection that the said Act expressly permits payment to a person dependent upon the member, but does not mention a person upon whom the member is dependent, and the legislative intention to exclude the latter is fortified by the amended Act of May 15, 1913, P. L. 207, which adds to the limitation of beneficiaries as above quoted, the proviso: "That if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege, with the consent of the society, to make such institution his beneficiary."

7. The claim of Joseph Schwartz is founded, (1) upon the facts that in 1902, the member being unable to pay his dues or to obtain financial assistance from any relative, and being therefore on the brink of expulsion from the society, applied to said Schwartz for help, agreeing to designate him as the beneficiary if he would advance the dues past and future; that Schwartz agreed to make the advancement if the local officers of the society would approve; that the said officers thereupon did approve and

agree with the member to accept the designation if Schwartz would pay said dues; that Schwartz on faith of this understanding did pay as agreed and thus kept the member in good standing from 1902 until his death in 1915; that not satisfied with the agreement of the local officers, Schwartz by their agency caused the matter to be laid before the Supreme officers of the society at a general convention; that the Supreme officers assured the local officers that the agreement was proper and that if Schwartz should pay the dues as agreed he would receive the death benefit if designated by the member; that the local officers advised Schwartz of this action by the Supreme officers, and he thereupon continued payment of dues until the member's death; (2) upon the written designation by the member bearing date August 23, 1915, in which, as above stated, the two Pjatniks are included; (3) upon a written assignment bearing date September 4, 1915, of \$500, "for the consideration that the said Joseph Schwartz has paid all my dues and assessments since the year 1902, and has provided me with a living and work and has taken care of me, and I take this way of repaying the said Joseph Schwartz for the above."

Proceeding now in the light of the foregoing statement to determine the ownership of the money in court, we say:

(1) The designation of Anna Pjatnik is unquestionably valid, on the ground of her being a blood relative if on no other ground, as we have already suggested; and since the designation is made jointly to her and Joseph Pjatnik, without fixing the shares, we presume intention to divide in equal shares and allow to her \$250.

(2) The designation of Joseph Pjatnik is invalid, because he is not a blood relative, nor a member of the family, nor an heir, nor a dependent, nor an incorporated charitable institution upon whom the member was dependent; nor did he ever receive the consent of the society by contract or otherwise to the designation, if this be material.

We have no hesitation in holding that at least in the absence of such consent the limitations of the statute and by-law exclude Joseph Pjatnik.

The fundamental law of these beneficial societies, as expressed therein, takes from a member and was intended to take the temptation, by taking the power, to traffic with outsiders in the pecuniary privileges of membership.

It is claimed, however, in behalf of Joseph Pjatnik, on the authority of *Schoales v. Order of Sparta*, 206 Pa. 11, that the defendants in this issue, though heirs of the member, have no standing to dispute his designation.

In that case the society was organized in 1879, long prior to the Act of 1893; after the Act of 1893, the member designated as beneficiary a certain friend not embraced within the limita-

tions of the Act. This designation was made in accordance with the rules of the society and was approved by its officers. After his death, his sister and sole heir at law, sued the society for the death benefit, contending that the friend could not be properly designated as a beneficiary by reason of the Act. The society paid the money into Court, and an issue was framed between the heir and the friend. It was held that the Act of 1893 was not prospective and did not take from the member his prior right to make the designation. But said the Supreme Court: "In any event the appellant here would seem to be without standing to question the designation of a beneficiary by the deceased. It is true that she is within the class from which the member might have made his selection had he seen fit to do so. But he did not indicate her as his choice. In the exercise of the right for which he had contracted with the association in 1882, almost eleven years before the passage of the Act of 1893, he after the death of his wife designated his 'nearest friend', William Graham, as beneficiary in her stead. The association raises no question as to the rightfulness of his action in so doing, and we do not think the appellant has any standing to complain. Her mere relationship as sister is not sufficient, and she has nothing more."

Of course, the literal acceptance and application of this statement as law, would end the case in favor of all the plaintiffs, and would end the statutory limitation in every case in which the society brings an invalid designation into court upon an interpleader with the legal heirs.

The designation though against the law would always stand, and the law would be completely frustrated.

The whole current of judicial decision is antagonistic to such a conclusion.

For aught that the report of the case indicates, however, there may have been no provision for payment to heirs in default of a valid designation, while in the case at bar the by-law expressly provides for payment to "his designated beneficiary or his legal representative", and "legal representative" means "heir" in such a contract. (Harton's *Est.*, 213 Pa. 419.)

That case was explicitly and fully decided on the unequivocal and unquestionable proposition that the Act of 1893 could not have retroactive effect upon contracts made prior to its passage, and the entire tone of the utterance which we have quoted, outside of that proposition, indicates that the utterance should be taken as *obiter dictum*.

Therefore we decide that Joseph Pjatnik is entitled to receive no part of the money in court.

(3) The designation of Joseph Schwartz, however, stands upon a different footing.

Like Joseph Pjatnik, he is not a beneficiary authorized by the

Act of 1893 and the by-law, but the stated facts make him the savior of this membership, the preserver of this death benefit, and the creator of this fund in court.

By his assumption and payment of dues from 1902 to 1915, he maintained the membership which would otherwise have terminated, and made it possible to receive the death benefit therefrom which would not otherwise have been available.

This he did on faith of the promised designation, which was agreed to by the local and Supreme officers of the society.

It is perhaps correct to say that the case stated shows no corporate authority of these officers to thus agree, but after all these years of recognition the authority should not be questioned.

Perhaps, also, in the line of strict reasoning, it may be unsound to discriminate on this point between Joseph Pjatnik and Joseph Schwartz against the express statutory limitation, but every consideration of natural justice leads to the conclusion that neither the spirit nor the letter of this statute demands a construction vitiating this designation, rejecting the meritorious agency which maintained this membership, and turning over the proceeds to relatives who in apparent disregard of their own fraternal duty, devolved upon a stranger the financial burdens of the membership and are now seeking to secure for themselves the benefit thereof without a single atom of equity to justify such a demand.

For this conclusion we find in the case of *Shumega v. First C. S. U. of U. S.*, 61 Superior 126, very strong encouragement, if not express authority.

The facts there, concerning the designation and constituting the equity, were practically identical with those here, and led the Superior Court to say, in suit by the person designated against the society, that "the claim presented by the plaintiff is supported at least by every consideration of natural justice."

The society, however, was a corporation of Ohio, and in the decision holding it liable on its special contract to recognize such a designation, the Court laid stress upon the consideration that the plaintiff could establish a case without invoking the Pennsylvania statute at all, and that the latter had no application whatever to such a contract made by a corporation of another State.

"Where," says the Court, "in the language of this statute, can be found any legislative declaration that a corporation incorporated under the laws of the State of Ohio and lawfully doing business in the State of Pennsylvania, may not contract for a valuable consideration that it will pay to a designated party a certain sum on the death of one of its members who has died in good standing?"

That case would be express authority for the case at bar if the defendant there, as here, had been a Pennsylvania society, under the Act of 1893.

It should be observed, however, as matter of encouragement, that the law of Ohio was assumed to be like the law of Pennsylvania; for, says the Court, "although the defendant was incorporated in 1892, under the laws of the State of Ohio, we accept the conclusion of the learned referee that in the disposition of this case our action must be controlled by the laws of our own State. It is not now important whether this conclusion follows from the nature and character of the contract we are to consider; or rests on the presumption raised by the record before us that the law of Ohio is identical with the law of Pennsylvania."

In view of this assumption, and of the circumstance that the society although incorporated in Ohio was lawfully transacting business in Pennsylvania, we have there a case in which contrary to the legal limitation, a contract was sustained upon the same equitable grounds existing here.

We invoke this principle for this case.

If the society were sued by Schwartz, it could not defend, and on this interpleader the defendant heirs have no standing to go behind the society's liability.

It would be a plain perversion of justice to decide otherwise.

His claim to \$500 of the money must be recognized.

Notwithstanding the exceptionally able brief submitted by the learned counsel for defendants, we are unable to reach any other view of the situation.

In accordance with the foregoing conclusions, and in conformity with the submission by the case stated, we enter judgment, (a) in favor of Anna Pjatnik for two hundred and fifty dollars (\$250), (b) in favor of Joseph Schwartz for five hundred dollars (\$500), and (c) in favor of Elizabeth Koscelanski and Andrew Fedorak for two hundred and fifty dollars (\$250).

Abram Salsburg, for plaintiffs.

John Menovsky, for defendants.

DEWITT v. GARDNER.

Bailment—Conditional sale—Distinction—Automobile.

1. Where agreement for lease of a chattel, contains specified sum for purchase, and that upon purchase sums paid for hire shall be deducted, it is to be interpreted as bailment.
2. As above, where automobile was so leased, even where the size of payments would suggest that a sale was intended.

Rule for judgment for want of a sufficient affidavit of defense.
Common Pleas, Luzerne county. No. 380, October term, 1918.

WOODWARD, J., March 15, 1919.—This is a rule for judgment for want of a sufficient affidavit of defense. The plaintiff leased an automobile to Price Brothers of Plains, Pa., at a monthly

rental. The lessees did not comply with the conditions of the lease, and the plaintiff, seeking to recover the machine, found it in the possession of the defendant, who claimed a lien for repairs made at the instance of the lessees and refused to deliver the automobile to the plaintiff unless the full amount of his claim were paid. Thereupon the plaintiff brought this action of replevin, giving bond in the sum of \$500, and the defendant filed a claim property bond in the like sum of \$500. The sheriff refused to deliver the automobile to the plaintiff but later defendant's attorney agreed that the machine should be surrendered.

The affidavit of defense claims a lien for repairs on the ground that the transaction between the plaintiff and Price Brothers was a conditional sale and not a bailment or lease as claimed by the plaintiff.

If it was a bailment, the rule should be made absolute, because the plaintiff was the owner and there was no privity of contract between the plaintiff and the defendant; if a conditional sale, the rule should be discharged because the title was in Price Brothers, who ordered the repairs made.

Our appellate courts have said that in deciding whether contracts of this kind were bailments or conditional sales, they would look at the substance rather than the form of the contract, and if it appeared that the transaction was really a sale they would so declare it, though the contract was framed so as to make it appear a bailment. It appears to us from the value of the car and the size and periods of payment that a sale was intended, but the agreement is in a form that has been construed to constitute a bailment, because at the end thereof appears this covenant: "It is further agreed that if said hirer, his administrators or executors, at any time while this contract is in full force, upon returning the said car to the owner and the performance of all the covenants and agreements herein contained shall have the option of purchasing said car for the sum of three hundred fifty dollars (\$350) and then in that event only the amount of the said hire which has been heretofore paid shall be applied on said purchase price."

The defendant claims that notwithstanding this covenant the case should be submitted to the jury to find whether the real intention of the parties was to effect a sale and if we were free to do so we would comply. But agreements in this form have been commonly upheld as bailments notwithstanding other indications that the intention was a sale, and we must adhere to the rule *stare decisis*.

Rule absolute.

P. L. Drum, B. F. Tinkham, for plaintiff.
F. P. Slattery, for defendant.

COM. OF PENN'A *et al.* v. FERRARINI *et al.**Practice—Replevin—Costs and damages.*

Where in suit on replevin bond, plaintiff's statement sets forth the rents due, for which goods were distrained and replevied, together with interest, costs, and for damages to a certain amount, judgment, in case of insufficient affidavit of defense would include rent, interest, and only such costs as are ascertainable with certainty, and set forth particularly in the statement.

Affidavit of defense raising law points in limine. Common Pleas, Luserne county. No. 201, March term, 1919.

WOODWARD, J., April 3, 1919.—This is a suit on a replevin bond given by Joseph L. Ferrarini to the Commonwealth for the use of the plaintiff, Antonio Savino, with Filomena Sardoni, the other defendant, as surety on the bond. Defendants have filed an affidavit of defense raising five objections to the plaintiff's statement. The only one that we consider has sufficient merit to warrant attention is the fourth, to-wit:

"4. That said statement is insufficient in that it fails to specify or set forth clearly and concisely the various items or amounts which are claimed for damages, loss, costs, etc."

Plaintiff's statement in the ninth paragraph sets forth that the amount of rents due the plaintiff for which she had issued a landlord's warrant and distrained the goods that were subsequently replevied by the defendants was \$435.65. In the tenth paragraph the plaintiff claims by reason of defendant's failure to prosecute with effect his action of replevin, damages in the amount of \$1,000, made up of costs and loss.

This is sufficient. The condition of the bond given by the plaintiff in replevin is that "if the plaintiff or plaintiffs fail to maintain their title to such goods or chattels, he or they shall pay to the party thereunto entitled the value of said goods and chattels and all legal costs, fees and damages which the defendant or other person to whom such goods and chattels so replevied belong may sustain by reason of the issuance of such writ of replevin."

In *Clements v. Dempsey*, 7 Superior 52, Judge Rice delivering the opinion of the Court, says: "Conceding, however, for the purposes of the case, that there was a breach of the condition of the bond to prosecute the suit with effect, for which an action would lie, the measure of damages is not the penalty of the bond, but the actual damages sustained in the particular case. For the purposes of a motion for judgment for want of an affidavit of defense, or of a sufficient affidavit of defense, these, as we have seen, must be set forth in the plaintiff's statement with such particularity that the specific sum to which the plaintiff is entitled

may be ascertained with certainty; what is not so set forth need not be considered on the hearing of such a motion."

If plaintiff should obtain a rule for judgment for want of an affidavit of defense in this case, or of a sufficient affidavit of defense, he would be entitled to judgment for the rent in arrears, the interest thereon, and costs, for he has specified these items in his statement and they can be ascertained with certainty. If he desired to recover anything beyond that amount up to \$1,000, at which sum he lays his total damages, he would fail, because it is not specified with sufficient certainty; but as Judge Rice says, what is not so set forth need not be considered, so that if the plaintiff is satisfied with the statement of damages we see no reason why the defendant should object.

The questions of law raised by the affidavit of defense are decided against the defendant, and he may file a supplemental affidavit of defense to the averments of fact in the statement within fifteen days, as provided by Section 20 of the Practice Act of 1915, P. L. 483.

J. L. Morris, for plaintiff.
W. W. Hall, for defendant.

BREISCH *v.* HAZLE DRUG CO.

Contract—Offices of corporation—By-laws—Oath and bond.

1. Where plaintiff sues for balance of year's salary as secretary, treasurer and manager of corporation, having been discharged after six months, failure to show that he has complied with the by-laws in taking prescribed oath and filing bond (also Act May 14, 1891, P. L. 61), would be fatal to recovery.
2. Where routine of corporation is annual election of officers, though monthly compensation is designated and no term specified, inference would be that the term is a year.

*Motion for judgment n. o. v. Common Pleas, Luzerne county.
No. 212, October term, 1916.*

FULLER, P. J., February , 1918.—The plaintiff's claim is for balance of salary as secretary, treasurer and manager of defendant company for the alleged term of one year, from July, 1915, to July, 1916, he having been honorably discharged against his protest at the end of January, 1916, and having been paid in full to that time.

The contract is thus set forth in the statement: "On or about the first day of July, 1915, by oral agreement with the board of directors of said defendant company, the plaintiff was employed as secretary and treasurer and manager of said company for a term of one year from the first day of July, 1915, at a salary of \$30 per week, payable every two weeks for the period of one year," etc.

Upon the trial this was amended to read: "For a term of one year, from July 7, 1915, at a salary of \$120 per month, payable monthly for the period of one year."

The defendant asked for binding instructions in its favor, viz.:

"1. Under all the evidence and the law in this case, the verdict must be for the defendant.

"2. The plaintiff having failed to show that he qualified for the offices of secretary and treasurer by taking the oath prescribed and filing the surety bond required by the by-laws of the corporation, cannot recover in this case.

"3. The contract in this case, as evidenced by the minutes, was a contract of hiring at a certain monthly salary.

"4. The contract in this case cannot be construed in the light of the by-laws and the records of the corporation and its minutes, as a contract for the term and period of one year."

We refused these requests and on the undisputed evidence we gave binding instructions in favor of the plaintiff for the amount which counsel for both parties agreed to be proper if the defendant was liable at all.

A summary of the proof bearing upon the legal contentions may be briefly stated.

The plaintiff's tenure of office is predicated upon the following action by the board of directors, as set forth in minutes of meeting July 7, 1915: "Upon motion duly made and seconded, Mrs. Littleton was elected President and William H. Breisch secretary and treasurer, each to receive a monthly salary of \$120."

This was evidently not regarded as referring to the calendar month, for payment was made on the basis of \$30 per week until the discharge.

Although not expressly elected manager, the plaintiff seems to have been regarded as such, exercising managerial functions as well as those of secretary and treasurer.

The pertinent by-laws of the company are these:

A board of directors shall be elected annually on June 15; the officers shall consist of a president, secretary, treasurer, and such others as may from time to time be elected or appointed by the board; the secretary shall be sworn to the faithful discharge of his duties; the treasurer shall render whenever required an account of all his transactions as treasurer, and at the regular meeting of the board in June a like report for the preceding year, and be bonded to an amount not less than \$5,000 in a recognized bonding company; officers shall be subject to removal during their respective terms of office for cause; the board shall have power to elect or appoint all necessary officers or committees, etc., to dismiss any appointed officer or employee, and generally to control all the officers and affairs of the corporation; no contract involving more than \$200 shall be entered into by the company except by direction of the president.

Nothing in by-laws or minutes fixes the term of the secretary and treasurer or manager.

The plaintiff, as secretary, was never sworn to the faithful discharge of his duties, nor did he as treasurer ever give the required bond.

In the light of the foregoing, we now think that we should have given binding instructions in favor of the defendant and that judgment *n. o. v.* should now be entered in its favor.

1. It seems perfectly obvious that the plaintiff, not having qualified as secretary by taking the required oath, and as treasurer by giving the required bond, was only *de facto* such during the period of actual service, and neither *de facto* nor *de jure* such after his discharge, during the period covered by his present claim.

It is quite likely that not being *de jure*, he would not be entitled to recover salary even if he had been *de facto* during the period; but it seems altogether certain that being neither, he has no enforceable claim.

The by-law requiring bond is based upon the statute (Act May 14, 1891, P. L. 61), which provides that "the treasurer shall give bond in such sum and with such sureties as shall be required by the by-laws for the faithful discharge of his duties, etc., and if he shall neglect or refuse so to do, he shall be liable to a penalty of \$50 for every day he shall fail to do so"; and, of course, it would be incongruous to recognize a right to receive salary while he was thus liable.

2. The question of term, whether month or year, is not so plain, and may be regarded as fairly debatable.

Ordinarily an employment on compensation payable monthly, without any specified term, would be regarded as one by the month, if the context or circumstances did not imply a longer term.

In this case the term of office is not expressly fixed by statute, by-law, resolution, or contract.

Our only guide to the conclusion of a yearly term, instead of monthly, is the general custom of corporations to elect a secretary and treasurer annually at the organization following election of directors, and a consideration of the functions appertaining to the offices, which could not be conveniently exercised monthly or otherwise than at least yearly.

Having decided the case on other grounds, we will not now decide this point, but we should be inclined to hold that a person elected corporate secretary and treasurer is elected for a year, although a monthly compensation is designated and no term is specified.

The motion for judgment *n. o. v.* is allowed, with exception granted to the plaintiff in this regard.

A. L. Turner, for plaintiff.
J. H. Bigelow, for defendant.

CONWAY *v.* THE HUDSON COAL COMPANY.

Workmen's Compensation Act—Appeal—Computation of time of work.

1. Where in making award for damages for an employee's injury, referee, sustained by compensation board, estimated daily hours as thirteen, and seven days in the week, thus traversing Sec. 309, Art. 3, Workmen's Compensation Act, and interpretation of Mine Workers, appeal by defendant may be dismissed if findings of referee do not include the testimony before him, and where the Court has nothing but the findings, regular on the face thereof.
2. Citation of *Macaulay v. Woolen Co.*, 4 Dept. Reports, 1175, where ruled that notes of testimony before referee are not a part of the record, and judicial review is limited to mere inspection to ascertain whether judgment is in conformity therewith, or whether tribunal rendering judgment exceeded jurisdiction or discretion.

Appeal from the Workmen's Compensation Board. Common Pleas, Luzerne county. No. 389, July term, 1918.

WOODWARD, J., September 25, 1918.—The question raised by this appeal is what is to be considered as overtime for a workman in continuous employment about the anthracite coal mines, and whether in calculating the claimant's average weekly wage at the time of the accident eight hours is to be taken as the working day, and the time worked over eight hours as overtime, to be excluded under the provisions of Section 309 of the Workmen's Compensation law, or whether thirteen hours a day, which was the regular working time of the claimant during the entire course of his employment with the defendant, is to be taken as the standard for computing his weekly wages and nothing treated as overtime except where he might have been called upon to work in case of emergency over thirteen hours, which was his regular working day.

The facts as found by the referee and affirmed by the compensation board, are as follows:

"Findings of fact:

"Admitted, that the claimant was, on June 25, 1917, at 8:50 p. m., a laborer of the first class in the employ of the defendant at its Baltimore No. 5 colliery, which is located in Luzerne county, Pennsylvania, when he was pulling a chain and a link broke, throwing him to the ground about twenty feet, causing a fracture of his right ankle and injured his back and wrist, thus sustaining an injury, by accident, in the course of his employment, on account of which he was prevented from working from June 25, 1917, to September 10, 1917, and was then still on crutches, or totally disabled.

"The only question of fact raised by the petition is, what were the claimant's average weekly wages at the time of the said accident. After hearing the evidence, the referee finds the claimant's average weekly wages at the time of the said accident to have been \$20.62, which he has computed in the following manner and

after considering the folowing as facts which he has found from the evidence:

"That the claimant was employed continuously by the defendant, at repairing machinery, from May 16, 1917, to the time he was injured in the manner hereinabove described, on June 25, 1917, working thirteen hours every day in the week at the rate of \$0.2266 per hour, and such had been such usual, customary, common and regular practice during the aforesated time; that he worked no 'overtime' during any part of the aforesated time, or period, and his earnings at such aforesaid employment during the last full week preceding the above mentioned accident and injury were \$20.62 (\$0.2266x13x7)—Rule 5, 'Rules for Ascertaining Wages', bulletin No. 3, rules and rulings of the Pennsylvania Workmen's Compensation Board.

"Prior to the date of the said accidental injury, neither the claimant nor the defendant had rejected, either one to the other, the provisions of article 3 of the Pennsylvania Workmen's Compensation Act of 1915.

"Conclusions of Law:

"In view of the above stated facts, the referee is of opinion that the claimant is entitled to an award of, and the defendant is liable to the said claimant for the payment of, compensation, under the provisions of article 3 of the Pennsylvania Workmen's Compensation Act of 1915, on account of the injury sustained and the subsequent disability described in the said above stated facts.

"(Signed) **GEORGE W. BEEMER,**
"Referee, Third District."

In affirming the findings of the referee the compensation board in its opinion simply says "appeal dismissed."

"(Signed) **HARRY A. MACKEY, Chairman.**"

Concurred in by
Commissioners Scott and Leech."

Section 309 of Article 3 of the Act provides *inter alia* as follows: "In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour, or by the output of the employee, his weekly wages shall be taken to be five and one-half times his average earnings at such rate for a working day of ordinary length, excluding earnings from overtime, and using as a basis of calculation his earnings during so much of the preceding six months as he worked for the same employer."

It will be observed that the sum \$20.62 as the amount the claimant earned during the last full week preceding the accident was arrived at by the referee by multiplying \$0.2266, his hourly wage, by thirteen, the number of hours he worked, by seven, the number of days in the week he worked. The ~~multiple~~ seven seems to be in direct violation of the provisions of Section 309

that the multiple to be used shall be five and a half, but the defendant has not excepted to this part of the finding and does not urge a reversal of the referee on that ground; but the defendant argues strenuously that the referee erred in adopting thirteen hours as the proper multiple in arriving at his daily wage, because the agreement between the employer, defendant, and the employe, claimant, made in 1916, was that eight hours should be a working day, and therefore that the difference between eight hours and thirteen hours, or five hours, should be excluded in the computation as overtime. The defendant on the hearing before the referee put in evidence the award of the anthracite coal strike commission, made in 1902, and the subsequent agreements which have been made between the operators and the mine workers since, and the third article of the agreement of 1916, reading as follows:

"An 8-hour day means eight (8) hours of actual work, for all classes of labor, at the usual working place, exclusive of noon-time, for six (6) days per week, if the operator desires to work his mines to that extent, excepting only legal holidays. The time required in going to and coming from the place of employment in or about the mine shall not include any part of the day's labor. * * * If, because of breakdown, repairs or the requirements of transportation, or other causes essential to efficient operation, it is found necessary to extend the normal workday of any employe, or any class of employes, the operator may do so, at his option, paying for overtime a proportional rate per hour as determined from the rates established under Section I hereof."

The defendant also put in evidence before the referee a case which came before the conciliation board, in which there was an appeal to the umpire, Neale, in which the question of overtime was raised and it was claimed by the mine workers in that case that everything beyond eight hours was overtime, because in that case it was to their advantage to construe the agreement in that way.

If we were sitting as the referee with this testimony before us, the argument of the defendant would appeal to us strongly as the reasonable interpretation to put upon the Act and as the interpretation that the Mine Workers had themselves put upon it, but it has been held by the Supreme Court in the case of *Macauley v. Imperial Woolen Co.*, 4 Department Reports, 1175, in an opinion by Judge Moschizisker, that on an appeal from the compensation board to the Common Pleas the notes of testimony taken before the referee or the board are not a part of the record, and that the appeal is in the nature of a certiorari, in which judicial review is limited to a mere inspection of the record to ascertain whether the judgment in question is in conformity therewith, or to see whether the tribunal which rendered such judgment either exceeded its jurisdiction or abused its discretion.

Having nothing before us, therefore, but the findings of the referee that thirteen hours was the usual, customary, common and regular practice of the plaintiff in his work during the time he was employed by the defendant, and nothing in the record to indicate what the testimony was before him—the testimony not being sent up on the appeal and not a part of the record if it had been sent up—there is nothing before the Court except the record, which seems to be regular on its face; and therefore there is nothing for the Court to do but to dismiss the appeal.

This practice seems to work a hardship on the defendant in this case, and in some cases on the claimant also, because the record may be entirely regular on its face and yet the referee may have ignored certain testimony that was offered that if included in the record and made a part thereof, on appeal would move the Court to reverse the referee. In this case it was alleged by the defendant's counsel that he submitted written requests for findings of fact to the referee, which, if the referee had disposed of and made a part of the record, would enable the Court to take cognizance of the facts in disposing of the appeal, but the referee replied to the defendant's counsel that he was not obliged to and refused to do so.

Appeal dismissed at cost of the defendant, and the judgment of the compensation board affirmed.

R. J. Dever, for claimant.
J. H. Torrey, for defendant.

PEOPLES UNION SAVINGS BANK *v.* LAWALL.

Practice—Affidavit of defense—Waiver.

Where plaintiff files reply to counter claim set up in affidavit of defense (Practice Act, Sec. 17) and takes rule, he does not thereby waive all exceptions to affidavit.

Rule to enter judgment for want of sufficient affidavit of defense. Common Pleas, Luserne county. No. 282, October term, 1917.

FULLER, P. J., November, 1918.—In this case the plaintiff filed reply to the counter-claim set up in the affidavit of defence, as provided in Section 15, Practice Act nineteen fifteen, and at the same time took this rule, as provided in Section 17 of that Act.

The defendant now urges that by filing the reply the plaintiff waived all exceptions to the affidavit of defence, and this preliminary point of practice is submitted to the Court in banc for decision before disposing of the rule.

We deny defendant's contention on this point, and direct that the rule be returned to the argument list, subject to anticipation on motion of either party.

W. W. Hall, for plaintiff.
A. L. Williams, M. Morris, for defendant.

GAUGHAN, ASSIGNEE, v. BRADY.

Landlord and tenant—Lease—Assignment—Remedies—Application to ejectment.

1. Assignment of lease containing with it all the remedies contained in the lease, should carry with it all the remedies contained in the lease, whether words "successors and assigns" are used, or not.
2. Rule that a party by assignment of lease to him by lessors is clothed with all the rights and powers relative thereto * * * should apply to confession of judgment in ejectment as well as the right to dispossess for rent.

Rule to open judgment in ejectment by confession. Common Pleas, Luzerne county. No. 156, January term, 1919.

WOODWARD, J., January 13, 1919.—The question raised by this proceeding is whether the assignee of a lease for a dwelling house containing a confession of judgment in ejectment in case of default in the payment of rent can avail himself of the provision, or whether it is a personal covenant inuring to the benefit of the original lessor only. We hold, in the language of the Supreme Court, that "a party by an assignment of a lease to him by the lessors is clothed with all the rights and powers relative thereto which the lessors could have exercised." *Kost v. Theis*, 20 W. N. C. 545.

HISTORY OF THE CASE.

By a lease dated November 20, 1917, John Gaughan leased to defendant, Eugene Brady, in consideration of the yearly rent of \$480, payable monthly in advance, to-wit, \$40, on the first day of each month, for the term of one year, with option for three additional years, a certain store room and dwelling in the borough of Kingston, together with some personal property, the lessee to have an option at the end of the first year to purchase the personal property at four hundred dollars. The several instalments of rent reserved to be payable at the lessor's office without previous demand for the same. It was further agreed between the parties that in case of holding over by the lessee after the expiration of the term, all covenants contained in the lease not expressly altered should continue in force, and the confession of judgment shall also stand for liability thereby incurred; that for the breach by the lessee of any covenant expressed or implied, the entire rent of the term unpaid should become due and collectible by distress or otherwise, and shall continue thus due and collectible whenever the lessor might desire to take advantage of this pro-

vision, though not insisted upon at the time of the breach; that upon the breach by the lessee of any covenant, expressed or implied, the lessor might declare the term at an end and make entry without prejudice to the collection of the rent; that the right of forfeiture whenever a cause might arise should not be lost by the lessor's failure to declare a forfeiture for any previous cause. Then follows the confession of judgment in ejectment in these words:

"The lessee further doth hereby enter into an amicable action of ejectment for the premises aforesaid, with confession of judgment in favor of the lessors, their successors and assigns, and agrees that a writ of *habere facias possessionem* may immediately issue upon the filing hereof with the Prothonotary, whenever the lessors shall have the right to make entry or resume possession under the terms of this lease, with clause of *fieri facias* for costs."

On October 29, 1918, the defendant, lessee, called on the original lessor, John Gaughan, at his home in Archbald, Lackawanna county, and said that he, the defendant, had heard that Patrick Gaughan, the lessor's brother, wanted to take possession of the place and said he was willing to get out; whereupon the lessor told him that he would allow him a month's rent for his expense in moving. He did not move, however, and on the 20th of November, 1918, the lease expired by limitation, the defendant remained in possession and by thus holding over presumably exercised his option to renew the lease for the further term of three years. In December, 1918, John Gaughan, the original lessor, deeded the property to his brother, Patrick Gaughan, the plaintiff, and at the same time assigned the lease to him, the deed and lease bearing date December 2, 1918. At this time the defendant was still in possession, but was in default for the rent due October, November and December, 1918. On December 16, 1918, the defendant still being in default for three month's rent, the plaintiff, Patrick Gaughan, entered up the amicable action of ejectment contained in the lease with the confession of judgment in favor of the lessor, his successors and assigns, (Patrick Gaughan being the assignee) and issued a writ of *habere facias possessionem*; whereupon the defendant on December 20 obtained this rule to show cause why the judgment should not be opened and the writ stayed. In his petition for the rule he admits the assignment from John to Patrick Gaughan on the 2nd of December, but denies any notice to the defendant of the assignment until the amicable action of ejectment was entered. He sets up as a defense that John Gaughan, when he made the lease on November 20, 1917, did not have title to the

property. We find that he did, and that the defendant could not question the title even if he did not. He also sets up as a defense that at the meeting on October 29, 1918, when the defendant called on John Gaughan at his home at Archbald, that there was an agreement between John Gaughan and the defendant that the defendant might pay the rent at the end of each month instead of in advance, and that in consideration of the change in the method of payment he agreed to remain on the premises and exercise his option for a further term of three years. We find from the evidence that there was no such agreement at the meeting on October 29, but that at that time the defendant agreed to vacate and allow Patrick to have the premises at the end of the term. The defendant in his petition also sets up as a defense that sometime prior to December 2, 1918, he made a tender to John Gaughan of all the rent then due and payable. We do not find such to be the fact. There is no evidence of any legal tender of the rent or any other tender.

The defendant relies upon the case of *McClintock et al., Assignees, v. Loveless*, 5 D. R. 417, where Judge Morrison held that an assignment of a lease containing a confession of judgment in an amicable action of ejectment does not enable the assignee to avail himself of the confession of judgment, because in construing the lease it is to be taken most strongly against the lessor; that the confession of judgment is a harsh remedy in derogation of the common law and that as the covenant in the lease before him was not made with the lessor, *his heirs and assigns*, whereas the other covenants in the lease were with the lessor, his heirs and assigns, that it was a covenant personal to the original lessor and did not pass by the mere assignment of the lease.

The confession of judgment in the case at bar is "in favor of the lessors, their successors and assigns." This is sufficient to distinguish the case from *McClintock et al., Assignees, v. Loveless*, although we see no reason why an assignment of a lease containing a confession of judgment in ejectment should not carry with it all the remedies contained in the lease, whether it used the words "successors and assigns" or not; in other words, why the rule laid down in *Kost v. Theis, supra*, that "a party by an assignment of a lease to him by the lessors is clothed with all the rights and powers relative thereto which the lessors could have exercised", should not apply to the confession of judgment in ejectment as well as the right to distrain for rent, which was the question involved in that case. We see no difference between the assignment of a lease containing a confession of judgment in ejectment and the assignment of a judgment note.

Rule discharged.

G. B. Kleeman, for plaintiff.
J. McQuade, for defendant.

TRETHAWAY BROTHERS *v.* ISRAEL.*Practice—Supplemental affidavit of defense.*

1. Court has power to allow supplemental affidavit of defense though not expressly pronounced in Practice Act of 1915.
2. Such supplemental affidavit, however, cannot be allowed to introduce new defense not stated in original.

Exceptions to supplemental affidavit of defense. Common Pleas, Luzerne county. No. 145, March term, 1919.

FULLER, P. J., July 9, 1919.—I. We cannot sustain the contention of plaintiff that the Court had no power to permit a supplemental affidavit of defense.

It is true that the Practice Act 1915 does not expressly provide, and indeed in Section 17 even seems to forbid such a thing, except after an affidavit raising a question of law under Section 20, thus suggesting a doubt, which we expressed without deciding, in *Scranton Flour and Grain Company v. Maier*, 18 Luzerne 466.

It may be noted, however, that all of the prior affidavit of defense legislation, stands upon the same footing, but nevertheless the allowance of a supplemental affidavit in the sound discretion of the Court, under court rules, has been always sanctioned in practice with common consent of the legal profession.

It may be noted also that Section 21 Practice Act, expressly provides that the Court may allow an amendment or a new pleading to be filed upon such terms as it may direct, which language might apply to a supplemental affidavit.

At all events we will adhere to the practice until over-ruled by superior authority, conceding, however, the eminent desirability of abolishing one which tends to promote carelessness, perjury and procrastination.

2. This supplemental affidavit so far as it covers the same ground, merely reproduces and reiterates without correction, the infirmities of the original affidavit and therefore violates the express condition on which it was allowed.

3. Furthermore, the supplemental affidavit introduces for the first time a brand new defense in the nature of a counter-claim, amounting to \$4,200 not mentioned in the original affidavit at all.

This clearly exceeds the bounds of indulgence and must be rejected.

The only proper function of a supplemental affidavit is to correct the infirmities of the original in the manner of stating the defense therein set forth, and not to introduce a new defense.

The exceptions therefore are sustained and judgment is entered in favor of the plaintiff.

W. J. Trembath, for plaintiff.

A. O. Kleeman, for defendant.

ERMEL v. PENNSYLVANIA COAL CO.

Workmen's compensation—Facts supporting award—Appeal.

1. Where referee finds in suit for award under Compensation Act, following accident by explosion, and burns, from uncontradicted testimony of several witnesses unvarying good health of victim before accident, and total debility following accident, even though expert testimony indicates probable tuberculosis before accident, and that confinement to bed hastened disease, referee may be considered justified in making award, and compensation board justified in sustaining him, and Court will not in such circumstances interfere.
2. Where facts might justify a finding by referee, even though Court might not on similar evidence make similar finding, the award will be allowed.

Appeal and certiorari from the Workmen's Compensation Board of Pennsylvania. Common Pleas, Luzerne county. No. 470, January term, 1918.

GARMAN, J., May 27, 1918.—The controlling findings of fact as made by the referee and adopted by the compensation board are these :

"That total disability to the claimant on account of said accident and injury commenced immediately after the said accident occurred and the said injury was sustained, and has continued, due to the natural resultant effects of the said injury, and, is likely to continue for some time afterwards.

"That prior to the time of the said accident and injury the claimant was apparently a healthy and robust man, and was working regularly ; but, since the said accident and injury, the claimant has developed a very serious condition of tuberculosis of the lungs, which said condition is the cause of his present disability and is the natural result of the said injury.

"Appurtenant to the above finding of fact that the condition of the claimant at the present time is due to the said accident and injury, the referee states that, in his opinion, the *grave* tubercular condition of the claimant, primarily aggravated by the extensiveness of the said injury and the prolonged confinement of the claimant to his bed as the result of the same, might have been averted, had the defendant company removed the claimant to a hospital, away from, or out of, the unhealthy conditions testified to existing in the claimant's home, or, at least, to such an extent that he might have recovered sufficiently to return to work."

The defendant appeals on the ground that "there was no evidence or at least insufficient evidence to support the findings of

the referee and his award of compensation based thereon; subsequently affirmed by the compensation board, which adopted the conclusions of the referee" and that "whether there was evidence and whether there was evidence sufficient for the referee to base his findings of fact upon, are questions of law."

We are of the opinion that the law vests in us the power to determine whether there was evidence or sufficient evidence to justify the referee's findings of fact; and therefore our decision will be dependent upon the testimony in the case.

Peter Ermel, claimant, testified that about two months before the time of the injury, he weighed 186 pounds; that prior to his being burned he had never been sick a day in his life; that ever since his injury he has felt "played out"; that he is getting weaker; that before being burned he was strong enough but has not "been any good ever since."

W. F. O'Boyle testified that he worked with Ermel before he was burned; that Ermel in his physical condition was about as good a man as they had in the coal region, as a workman; that Ermel's weight six weeks before his burning was 187 pounds; that witness saw Ermel two or three times a day and never knew Ermel to be sick before he was burned.

Anthony Zurass testified that during their acquaintance of twenty-five or twenty-six years Ermel was never sick before he was burned.

Paul Ezbitsky testified that he was at the time of the accident working with Ermel; that witness had known Ermel only from the 19th October until the 27th day of October, the date of the accident; that Ermel looked nice, was a big strong fellow and doesn't look nice since the day he was burned.

Mary Ermel testified that she was married to claimant eleven years and had, prior to her marriage, known him for a period of three years; that Ermel was before the injuries well and strong; that he was a big, strong healthy man, never had a doctor, never laid up in bed a day; that since the accident he has been weak and poorly, is getting worse and has been doctoring ever since he was burned; that on the day he was burned, he complained of burns in the side; that he gets a pain in one side and then in the other; that he has pain every day since that time; that he has not been able to walk without resting; that he had pleurisy on the right side as she was told by Dr. Baker about a week after Ermel was burned.

Doctor Baker said that he did not tell to Mrs. Ermel that her husband was suffering from pleurisy but declared that he might have said it was "a pleuritic stitch"; that Ermel did not have

pleurisy; that he was tubercular and could not work because of the condition of his lungs; that Ermel's condition could not have resulted from exposure while on his way home; that when discharged his physical condition was very similar to what it is now; that he was very weak; that he hasn't been in condition to work since he was burned; that a pleurisy usually results from exposure; and that his general condition could be aggravated by exposure.

Doctor Reifsnyder, a specialist in tuberculosis testified that he examined Ermel and found at the top of the left lung evidence of a long continued tuberculosis process and a condition of acute tuberculosis, over the lower right lung, which must have been coming on for some four or five months while the old tubercular infection in the left lung must have been going on for a much longer time; that if Ermel had been burned in October, 1916, advanced tuberculosis could have come on by April, 1917; that it could have been caused by Ermel's low vitality caused by the burns and his having tuberculosis before; that the violent explosion, throwing dust and dirt didn't do Ermel any good but that witness did not think that the tuberculosis was caused by the burn or the explosion for in his opinion it was there before; and that the explosion might have aggravated the disease; that if burns made Ermel decrepit it would have a tendency to cause the rapid growth of the tuberculosis and if he was in bed for some time from some other cause, it would make him very much worse; that in witness' opinion, Ermel must have had tuberculosis two or three years; and that exposure and wounds are not good for tuberculosis.

Taking this partial summary of the evidence and considering the uncontradicted evidence of Ermel's physical condition just prior to the accident, we are unable to say that the referee was not justified in finding as he did as to matters of fact. Even if the referee's conclusions were not that which the Court might have made from the evidence, we are not unmindful that the referee had before him the witnesses and was to that extent in a better position to form a correct judgment of the candor and credibility of the witnesses. The compensation board have made the same findings of fact. Seeing then that we are of the opinion that the facts as found might be justified from the evidence, we are constrained by the positive mandate of the law from disturbing the action of the referee and board.

The appeal is dismissed and judgment of the workmen's compensation board is affirmed; and the prothonotary is directed to enter judgment in favor of claimant and against the defendant in accordance therewith.

W. L. Pace, for plaintiff.

H. J. Connolly, for defendant.

MAGEE CARPET COMPANY v. D., L. & W. R. R. CO.

Common carrier—Damages for delay in shipment—Measure of.

1. Plaintiff in suit against common carrier for damages from delay in delivery of merchandise necessary in manufacturing, fixed as measure of damages its loss from shutting down on account of inability to procure merchandise elsewhere for some time, and then only at prohibitive price.
2. On affidavit of defense raising question of law that this was not the right measure of damages:

Held, That while ordinary proper measure applicable would be difference in cost, because in theory, on assumption of procurability such measure would compensate, it would not compensate in case of non-procurability.

Affidavit of defense raising question of law: Common Pleas, Luzerne county. No. 789, May term, 1917.

FULLER, P. J., July 10, 1919.—The substance of plaintiff's claim as rather indefinitely set forth in the statement, is that the defendant, a common carrier, negligently delayed the delivery of certain merchandise necessary in plaintiff's business of manufacturing carpet, by reason whereof the plaintiff being unable to procure such merchandise for a period and then only at a prohibitory price, was compelled to shut down, at a loss of \$1,500 due to "idleness of looms, loss of profits, and idle operators."

The defendant in its affidavit of defense, under Section 20 Practice Act 1915, without answering the averments of fact in the statement, and without contesting its liability on some measure of damages, merely raises the question of law that it is not liable on the measure claimed by the plaintiff.

The essential legal principle involved in a measure of damage which determines its application in any case, is that it provides, at least in theory, compensation for the injury inflicted and the loss sustained as the natural and proximate result of the wrongful act; and ordinarily the proper measure applicable to non-delivery of merchandise would be the difference in cost, because in theory on the assumption of procurability, such a measure would ordinarily compensate; but it would not compensate in a case of non-procurability, or of non-procurability except at a prohibitory price, compelling discontinuance of business; and in such a case we think the true measure might be the one adopted by this plaintiff.

We may change our mind, as we reserve the right to do at a later stage of the action, but at present we decide the question of law against the defendant, who may file an affidavit of defense within fifteen days as provided by Section 20 aforesaid, and may also, if it desires, ask for a bill of particulars as to the damages which are indefinitely averred in the statement.

C. B. Waller, for plaintiff.

B. R. Jones, for defendant.

KEIRLE v. EDWARDSVILLE BORO. *et al.**Boroughs—Ordinances—Transcribing—Injunction.*

Where borough authorizes purchase of fire apparatus by ordinance and orders same before ordinance is duly transcribed, though it is afterward transcribed, though situation might warrant preliminary injunction, yet injunction will be dissolved where no benefit would result, but harm to taxpayers and community might result, from absence of adequate protection.

Motion to continue preliminary injunction. Common Pleas, Luzerne county. In Equity. No. 9, May term, 1919.

FULLER, P. J., July 10, 1919.—This injunction was granted on tax payer's bill against the borough of Edwardsville and its municipal officers, coupled as defendants with the White Company of Cleveland and the latter's sales-agent Frank Martz, to prevent purchase by the borough from the company through the agent, of a motor fire truck.

The grounds for injunction as averred in the bill are (1) in paragraph 6, that in the proposal to purchase, the defendants are proceeding without lawful authority; (2) in paragraph 7, that no proper constitutional provision had been made for the debt which would be incurred by the purchase, and (3) in paragraph 9, that the purchase involved an abuse of discretion in respect (a) to lack of necessity, (b) failure to investigate and to take bids, (c) grossly exorbitant price.

Ground (2) was abandoned before the hearing, and ground (3) after the hearing, thus leaving only ground (1), viz., lack of lawful authority.

The purported authority was an ordinance of the borough put in evidence by the plaintiff, which if effective would sustain the proposed purchase.

Plaintiff claims that it was ineffective because it had not been transcribed, or approved by the burgess and attested by the secretary, in the ordinance book, and advertised, in accordance with law.

This specific ground of illegality is not disclosed by the bill, but rather adroitly camouflaged under the general language "without lawful authority."

Commonly speaking adroitness is not a quality to be commended in the statement of their case by parties in equity, for the essence of equity pleading should be perfect frankness, or, to paraphrase one of the fourteen points, it should consist of open claims openly asserted.

But in the present case the borough authorities must be presumed cognizant of legal infirmities in their proceedings, and were therefore fully apprised by the general language, of

plaintiff's purpose to avail himself of any and every such infirmity disclosed by the evidence.

Now the evidence shows that the ordinance in question was not in fact transcribed in the ordinance book until after bill filed, April 17, 1919, and consequently under the law was not effective when the purchase was authorized on April 7, 1919.

As to the advertising, however, there is no proof either negative or affirmative, and while the chronology of the case indicates the improbability of legal advertising having been made, we make no presumption on the subject.

We have then a situation in which (1) at the time of authorizing the purchase and down to a time after filing of this bill, the defendants were acting under an ordinance, ineffective by reason of a secretarial omission to transcribe, and therefore without legal authority, warranting the injunction at the time of issuance, but (2) the ordinance afterwards did become effective by supplying the omission, and (3) it involves what the borough authorities deem necessary and still decisively approve for the important purpose of fire protection in the community.

In such a situation nothing would be gained and something might be lost to the tax payer and the community by continuing the injunction even though it was properly granted in the first instance.

The corporate purpose of the borough has been plainly expressed and is now formally established.

Under all the circumstances, therefore, the injunction should be dissolved.

We state as facts:

(1) The Borough Council of Edwardsville, on March 18, 1919, adopted a proper ordinance which on March 27, 1919, was approved by the burgess, authorizing the purchase of a motor fire truck;

(2) The said Council, on April 7, 1919, by motion based upon the said ordinance, authorized the proper officials to sign a contract of purchase for \$11,000 plus three per cent;

(3) In this proposal no dishonesty nor improvident abuse of discretion is claimed, but the plaintiff tax payer rests entirely upon the allegation of illegality above stated, *inter alia*, as we find;

(4) The said ordinance was not in fact transcribed in the ordinance book at the time of the action April 7, but,

(5) It was so transcribed after bill filed, and the borough authorities still stand upon it in defense of their action.

And we state as law:

The injunction should be and hereby is dissolved.

J. D. Farnham, W. A. Valentine, for plaintiff.

A. Salzburg, A. H. James, J. A. Davies, for defendant.

OTT & COMPANY v. DUPLAN SILK CORPORATION *et al.*

Mechanic's liens—Specification of work done—Act 1905, P. L. 172.

Where in mechanic's lien nature of work done, such as excavation, is set forth, giving quantity, price per cubic yard, and aggregate amounts, and specifying different kinds of excavation, the requirements of Sec. 2, Act 1905, P. L. 172, are sufficiently met.

Rule to strike mechanics lien from the record. Common Pleas, Luzerne county. No. 218, January term, 1918.

GARMAN, J., March 1, 1919.—Five reasons are assigned in support of the motion to strike off the lien as follows:

(a) The claim does not sufficiently set forth the nature or kind of the work done or the nature and character of the materials furnished.

(b) The claim does not sufficiently set forth the time when the materials were furnished or when the work was done.

(c) The claim does not set forth that any work was done or materials furnished for which there is any constitutional or legal right to a mechanic's claim.

(d) The claim does not set forth any amount for which the owner of the land and improvements described thereon are liable.

(e) The claim does not set forth sufficient facts from which the amount, if any, for which the owner of the land and improvement thereon may be liable, can be ascertained.

Reasons (a) and (b) are based on item (2) of Section 2 of the Amending Act of 1905, P. L. 172, which reads as follows: "The claim shall set forth (2) the amount or sum claimed to be due and the nature or kind of the work done, or the kind and amount of materials furnished, or both; and the time when the materials were furnished, or the work done, or both, as the case may be."

As to reason (a), an inspection of the lien, relating to "the nature or kind of the work done", shows the "nature or kind" of work done to have been set forth as follows: "Excavation * * * by steam shovel; excavation of * * * rock over lot requiring blasting; excavation of * * * rock in pier holes, footings and trenches; excavation of extra depth in piers * * * authorized and accepted by contractor; extra distance required to use dump; making new road to and from dump." We are of the opinion that these items are sufficiently specific to comply with the provisions of the Act of Assembly. They set forth the character of the work, to-wit, excavation; they give the quantity of excavation; they name the price per cubic yard and the aggregate amount; and they specify the different kinds of excavation. This seems to us to be as specific a statement of character and kind of

work as the nature of the work admits. The nature of the work scarcely admits of an itemized statement.

As to reason (b) we are of opinion that as to the excavation the time is sufficiently set forth.

As to reason (c) we think that the claim makes clear that it is filed for excavation and work done as sub-contractors. It sets forth that it is for excavation done to a building therein described and we are of opinion that for such excavation a lien may be filed.

With reason (d) that the claim does not set forth any amount for which the owners of the land and improvement thereon are liable, we cannot agree; for the claim expressly stated that the sum claimed to be due is \$22,105.07.

As to reason (e) we are of opinion that from facts as set forth plaintiff's claim can be ascertained.

A statement of claim filed for a mechanic's lien must show a substantial compliance with the requirements of the Act. This by comparison between the claim and the statute seems to have been done.

"Certainty to a common intent and substantial compliance with the Act is enough." *Day v. R. R.* 35 Superior Court, 556.

Rule to strike off lien is denied.

H. B. Hamlin, for plaintiff.

J. H. Bigelow, for defendant. —

OTT & CO. v. DUPLAN SILK CORPORATION.

Practice—Rule to strike off lien—Affidavit of defense.

Items improperly claimed in a lien may be rejected by trial judge. It is better practice to object to such items in affidavit of defense. Where lien contains one good item, it is sufficient.

GARMAN, J., January 23, 1918.—Having in our order discharging the rule to strike off the lien in this case, declared that, in our judgment, certain items of the lien are properly stated, we are constrained to discharge the above rule to strike out nine items of claim.

"If the claim contains one good item, which is the subject of a lien, it is enough. Upon the trial of the *scire facias* a verdict may be rendered for this item, although all the other items should be excluded from the jury." *McCristal v. Cochran*, 147 Pa. 225.

While it is undoubtedly in our power to strike out items of the claim as prayed for, still we are of the opinion that better practice is to object to such items in the affidavit of defense.

Defendants having protected themselves by this motion, items improperly claimed in the lien may, at the time of the trial, be rejected by the trial judge.

The rule to strike out items is discharged.

H. B. Hamlin, for plaintiff.

J. H. Bigelow, for defendant.

MORRIS & COMPANY v. HORVITZ, EXECUTRIX, *et al.*

Decedent's estate—Indexing suit and judgment—Lien.

Where suit against decedent's estate is not brought or indexed within two years after death, claimant has lost his lien upon the real estate, and entry of suit otherwise, in judgment docket will be stricken off.

Case stated. Common Pleas, Luzerne county. No. 747, March term, 1915.

STRAUSS, J., September 19, 1917.—The case stated sets out that Morris & Company, the plaintiffs, filed an action in assumpsit March, 1915, against the defendants; that Israel W. Horvitz on May 24, 1910, and by his last will, named the defendants as his executors; that the plaintiff directed the prothonotary of Luzerne county to index this suit in the judgment index which was accordingly done (J. D. 46), basing his right to have this done upon the Act of 1909, P. L. 386, Section 1; thereupon it is agreed that "if the Court shall be of the opinion that the suit was not begun within two years of the decedent's death or within 'such period' then judgment to be entered in favor of the defendants and the entry of suit in the judgment docket stricken off; otherwise, judgment for the plaintiff, that is, that the entry remain in the judgment docket. This agreement in no way to affect the case on the trial of its merits but solely to clear the real estate from the lien entered in the judgment docket."

The Act of 1909, to which reference is made, provides that no debts of the decedent, except as provided in Sections 3 and 4 shall remain a lien on real estate of a decedent longer than two years after the decease of the debtor, unless within said period an action for the recovery thereof be brought against the executor or administrator and such action shall be indexed within said period against the decedent and such executor and administrator in the judgment index in the county in which such action is brought, and also in the county in which the real estate sought to be charged is situate and be duly prosecuted to judgment * * * and then to be a lien only for a period of five years, etc.

The claim on which this suit is brought is not within the exceptions provided by Sections 3 and 4 of the Act. The suit was not brought nor indexed within two years after decedent's death and therefore the claimant had lost his lien upon the real estate. The bringing of the suit and the indexing of it in the manner in

which it was done seems to be regarded as a cloud upon the title of the real estate and therefore this case has been submitted for our opinion.

We are of the opinion that the suit was not begun within two years of the decedent's death or within "such period" and therefore we enter judgment in favor of the defendant and direct that the entry of the suit in the judgment docket be struck off.

Prothonotary is directed to strike off the index entry of this suit on the judgment docket and the judgment on the case stated to that effect be hereby entered.

COMMONWEALTH, USE OF SAVINO *v.* FERRARINI *et al.*

Replevin—Bond—Non suit—Act 1901, P. L. 88.

In action of replevin judgment of non suit may be entered against plaintiff on the trial, for want of appearance, thus establishing breach of the replevin bond without right to conditional verdict mentioned in Sec. 6, Replevin Act 1901, P. L. 88.

Supplemental affidavit of defense raising additional questions of law. Common Pleas, Luzerne county. No. 201, March term, 1919.

FULLER, P. J., July 10, 1919.—The action is assumpsit on replevin bond given by this defendant as plaintiff in replevin, against this use plaintiff as defendant therein, the latter as landlord having distrained the property for rent owing by a third party tenant who is not in Court, and the property being taken by the defendant claiming ownership as plaintiff in replevin aforesaid.

Upon trial of the replevin, the plaintiff therein, defendant here, did not appear, and the Court in due manner entered judgment of non-suit.

The propriety of this procedure, and its legal effect to establish a breach of the bond are now contested upon the single contention that upon the trial of the replevin a conditional verdict as specified by the Act of 1901 was not procured, a condition precedent to the maintenance of a suit upon the replevin bond.

No authority for this contention has been cited, and none can be found, unless it be the following provision in Section 6 of the Replevin Act of 1901, P. L. 88, viz:

"The declaration and affidavit of defense, etc., shall constitute the issues under which with the other pleadings the question of the title to or right of possession of the goods and chattels as between all the parties shall be determined by a jury. If any party be found to have only a lien upon said goods, etc., a conditional verdict may be entered which the Court shall enforce in accordance with equitable principles."

We find no merit in this contention.

1. The party has not been found by a jury to have only a lien. Nothing is found except the fact of default, and the legal conclusion resulting therefrom. All questions of ownership absolute or qualified on lien or otherwise, are left untouched, and necessarily so for want of proof in the absence of plaintiff to determine the same.

2. The plaintiff in replevin, defendant here, having failed to establish his ownership, and being in consequence non-suited, is not at all concerned in the allegation of lien inuring only to the third party tenant, who is not complaining.

3. We are not advised what conditional verdict or judgment might, could, or should be entered in this case, or what equitable principles might, could, or should be enforced by the Court in favor of a party who has failed to establish his claim, and whose unfounded interference by replevin has obstructed, delayed and injured a party in the lawful pursuit of a lawful remedy. When so advised we will be able to enforce any proper conditions just as effectively *nunc pro tunc* as *tunc*.

Accordingly for the second time in the progress of this action, a question of law raised by the defendant is decided against him, subject to any right conferred upon him by Section 20 Practice Act, 1915.

J. L. Morris, for plaintiff.

W. A. Valentine, W. W. Hall, for defendant.

SMITH v. DEISROTH.

Negligence—Damages—Automobile—Misunderstanding—Jury.

Where in suit for damages for injury to pedestrian by automobile, negative testimony of two witnesses that they heard no signal is offset by several who heard signal, place of accident allowing full view of roadway for 200 feet, and testimony indicates misunderstanding in driver stopping and starting several times to avoid collision and pedestrian alternately retreating and advancing, and evidence that car was not promptly stopped and pedestrian dragged some distance, question of negligence whether of driver or pedestrian is for the jury.

*Motion for judgment n. o. v. Common Pleas, Luzerne county.
No. 192, January term, 1916.*

WOODWARD, J., June 8, 1918.—This is an action of trespass brought by the plaintiff against the defendant to recover damages for injuries caused to the plaintiff by the alleged negligence of defendant's chauffeur in running her car unskillfully upon the highway in the village of Harleigh, Hazle township, Luzerne county, October 8, 1915, whereby the plaintiff was knocked down, run over and severely injured.

The testimony was directed to three specific acts of negligence: (1) Lack of signal; (2) excessive speed; and (3) failure to stop the automobile promptly after it had come in contact with the plaintiff.

If the plaintiff depended upon the first two allegations of negligence, we should feel inclined to grant the motion for judgment *non obstante veredicto*, because the testimony as to signals on the part of the defendant was positive as against the more negative testimony of two witnesses on the part of the plaintiff that they did not hear any.

If the plaintiff had looked, as he said he did, when in the middle of the road where he could see a car approaching for two hundred feet he must have seen it, or it must have come at an incredible rate of speed to have overtaken him where it did so that we could not have sustained a verdict based on excessive speed alone as negligence.

But the failure of the defendant's chauffeur to stop the car promptly after it had come in contact with the plaintiff presented a question of fact for the consideration of the jury. The plaintiff's evidence was that when the car was upon him he took hold of the radiator and was pushed back for a distance of fifteen feet before he finally fell and was run over; whereas the chauffeur said that he could have stopped the car in four or five feet. His failure to stop it within fifteen feet would therefore be negligence if the jury believed the plaintiff's testimony as to the distance, which was corroborated by one of his witnesses.

The facts are very similar to those in *Dougherty v. Davis*, 51 Superior Ct., 229, except that the plaintiff in *Dougherty v. Davis* was placed in a dangerous position by the clear negligence of the defendant; whereas it is not clear in plaintiff's case that the dangerous position he found himself in was due to defendant's negligence or his own. Under the defendant's testimony it was a case of mutual misunderstanding and confusion rather than a case of negligence. As the automobile approached the chauffeur saw the plaintiff start across the street from the sidewalk and stopped his car. The plaintiff also turned back, whereupon the chauffeur started again and the plaintiff started again at the same time. The car stopped and the plaintiff stopped the second time, and the third time after both had started, thinking the other would wait, the collision occurred. So that under the defendant's testimony it was a case of mutual confusion rather than negligence on the part of the plaintiff that placed him in his perilous position.

Under these circumstances we think the case was properly left to the jury, and the motion is denied.

F. A. McGuigan, J. P. Costello, for plaintiff.
J. H. Bigelow, J. H. Sharpless, for defendant.

STECK *v.* REPA.

Husband and wife—Husband's deed of trust to another—Fraudulent intent—Rights of wife.

Where husband and wife have separated on account of cruel treatment of latter, and husband executes a deed of trust for \$2,700, with various purposes outlined, husband and wife subsequently becoming reconciled and living together until husband's death—

Held. That such deed of trust was obviously intended as fraudulent gift, intended to defraud the wife of her statutory rights, and equity will decree the amount involved as joint property of husband and wife until the former's death, and after his death as her property.

Common Pleas, Luzerne county. In Equity. No. 3, May term, 1919,

GARMAN, J., July 11, 1919.—The bill filed March 19, 1919, in this case sets forth:

(1) That she is the widow of Fedor Steck, deceased, late of Plains township, Luzerne county, Pennsylvania, who died August 2, 1918;

(2) That said decedent left to survive him the said widow and a minor child, Anna Steck, eight months of age, and the bill is brought in her own right and in right of said minor child.

(3) That the oratrix was married to said Fedor Steck on or about February 20, 1916, by Rev. Alexander Aleken, at Garfield, N. J., and thereafter lived and cohabited with said Fedor Steck until about March 20, 1917, when they separated because of his ill-treatment of her and they remained separated for several months.

(4) That on or about June 29, 1917, said Fedor Steck executed an alleged trust agreement, under which he purported to name John Repa as trustee, by which agreement the said Steck assigned to said Repa the sum of \$2,700 in trust for the following purposes:

(a) To invest, receive and collect all interest, income and profits therefrom.

(b) After the payment of all taxes, charges, and a reasonable compensation to said trustee, to pay the net income semi-annually to the said Fedor Steck.

(c) After the death of said Steck, to pay the principal of said money in his hands as follows: To Rosalie Stec, \$800; to the children of Wassil Stec, or the survivor of them, \$400; to the

children of John Stec in Europe, \$300; to the children of Paroska Rach in Europe, \$200; to Teremty Hotz, \$300; to Russian Orthodox Orphanage of Springfield, Vermont, \$300; to Mrs. Fedor Stec, \$100; to pay funeral expense, \$300.

In the said agreement said Fedor Stec reserves the right to terminate the trust after three years on three months' notice to the trustee.

(5) That said \$2,700 in said trust was part of a fund of \$3,250 realized from the sale of an undivided half interest in certain real estate which the oratrix and said Fedor Steck sold and conveyed to Wassil Steck by deed dated March 22, 1917, and the oratrix signed said deed by virtue of which said \$2,700 was realized upon the express agreement and understanding between her and said Fedor Steck that the fund arising from said sale should be held by her and the said Fedor Steck as an estate in entirety, and by reason of the death of said Fedor Steck the said \$2,700 became and now is the property of the oratrix.

(6) That said trust agreement was not executed by said Fedor Steck in good faith, but on the other hand was intended as a fraudulent gift for the purpose of defrauding the oratrix of her statutory rights as widow of said Fedor Steck.

(7) That said trustee did not invest said \$2,700 as set forth in said trust agreement, nor did he pay any taxes or pay Fedor Steck any income from said \$2,700.

(8) That on or about May 22, 1917, said Fedor Steck and the oratrix became reconciled and thereafter lived together as husband and wife until the time of his death.

The prayers of the bill were:

First. For a decree that the said \$2,700 described in said trust agreement continued to be the joint property of the oratrix and Fedor Steck until the time of his death.

Second. For a decree that by virtue of the death of said Fedor Steck said \$2,700 paid to said John Repa, trustee, by said Fedor Steck under and by virtue of the alleged trust agreement became the property of the oratrix.

Third. For a decree that at the death of said Fedor Steck, the \$2,700 became an asset of his estate.

The defendant's answer filed April 25, 1919, admitted the allegations in paragraphs 1, 2, 4 and 8 of plaintiff's bill; neither admitted nor denied the allegations of paragraphs 3 and 6 of

plaintiff's bill; admitted all of paragraph 5 of plaintiff's bill, except the last clause, to-wit: "and that by virtue of the death of said Fedor Steck said \$2,700 became and now is the property of your oratrix," which last clause was neither admitted nor denied; and denied the allegations set forth in paragraph 7 of plaintiff's bill.

By agreement filed April 28, 1919, the case was submitted to our decision as chancellor.

The evidence for plaintiff clearly establishes the following

FINDINGS OF FACT:

First. That the oratrix is the widow of Fedor Steck, deceased, late of the township of Plains, county of Luzerne, and State of Pennsylvania, who died August 2, 1918.

Second. That said Fedor Steck left to survive him the said oratrix and a minor child, Anna Steck, about eight months of age, and that the bill of equity was brought in the interest of the oratrix and the said minor child.

Third. That the said oratrix and said Fedor Steck were married at Garfield, N. J., on February 17, 1916, by Rev. Alexander Aleken, and after said marriage lived and cohabited as husband and wife until about March 20, 1917, when a separation resulted which lasted until May 22, 1917, when they became reconciled and lived together as husband and wife until the date of the death of the said Fedor Steck.

Fourth. That on or about June 29, 1917, the said Fedor Steck executed a paper as party of the first part with John Repa, of the city of Wilkes-Barre, county and State aforesaid, as party of the second part, as follows:

"Whereas, the said party of the first part is the owner of certain personal property, and

"Whereas, the said party of the first part is desirous that the party of the second part shall manage and control his estate,

"Now, this indenture witnesseth that the said party of the first part, for a valuable consideration to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, does hereby assign, transfer and set over unto the said party of the second part, his heirs, executors, administrators and assigns, the sum of twenty-seven hundred (\$2,700.00) dollars, in trust, nevertheless, for the following uses and purposes:

"To invest, receive and collect all interest, income and profits therefrom.

"After the payment of all taxes, charges and a reasonable compensation, the party of the second part to pay the net income semi-annually to the party of the first part.

"After the death of the said Fedor Steck, the said trustee shall pay the principal of said money in his hands to certain parties named in the said agreement."

Fifth. That said \$2,700 specified in said alleged trust agreement was a part of a fund of \$3,250, realized from the sale of an undivided half interest in certain real estate which the oratrix and said Fedor Steck sold and conveyed to Wassil Steck by deed dated March 22, 1917, and that the oratrix signed said deed by virtue of which said \$2,700 was realized, upon the express agreement and understanding between her and the said Fedor Steck, that the fund arising from said sale should be held by her and the said Fedor Steck as an estate in entirety, and that by virtue of the death of said Fedor Steck said \$2,700 became and now is the property of your oratrix.

Sixth. That said trust agreement was not executed by said Fedor Steck in good faith, but on the other hand was intended as a fraudulent gift for the purpose of defrauding the oratrix of her statutory rights as widow of said Fedor Steck.

Seventh. That said defendant trustee did not invest said \$2,700 as set forth in said trust agreement, nor did he pay any taxes or pay said Fedor Steck any income from said \$2,700.

Eighth. That on or about May 22, 1917, said Fedor Steck and the oratrix became reconciled and thereafter lived together as husband and wife until the time of his death, as above set forth.

We deem it advisable to say in connection with the evidence in the case that John Repa, the trustee, by his testimony established the facts with respect to the matters set forth in the fifth, sixth and seventh paragraphs of the bill and showed by his testimony that he was in no way a party further than being named as trustee in said agreement.

FINDINGS OF LAW:

We find as a matter of law:

First. That the said \$2,700 referred to and described in said trust agreement continued to be the joint property of the oratrix and Fedor Steck until the time of his death.

Second. That by virtue of the death of Fedor Steck said \$2,700 paid to said defendant, John Repa, trustee, by said Fedor Steck under and by virtue of alleged trust agreement became the property of the oratrix.

It is therefore ordered that a decree shall be formulated by counsel for complainant in accordance with the foregoing findings of fact and law.

W. A. Valentine, M. H. Salsburg, for plaintiff.
James H. Shea, for defendant.

MYERS v. MORGAN.

Landlord and tenant—Distress for rent—Unlawful removal of goods under lease.

1. Where owner of a leased piano removes the instrument from among goods distrained for rent before expiration of five days period for appraisal, and thereby prevents appraisal of that particular property, he cannot through urging of defect in the proceedings take advantage of his own wrong.
2. Thus where owner had given no notice to landlord of title to piano, had not replevied the goods, and where after constable's sale and insufficient return to pay rent claim, judgment was secured against the owner.

Motion for judgment non obstante veredicto. Common Pleas Luzerne county. No. 639, October term, 1915.

WOODWARD, J., January , 1918.—This is an action in trespass brought by Philip T. Myers, the plaintiff, a landlord, against the defendant, John E. Morgan, the owner of a piano distrained on the premises of a tenant against whom the plaintiff had issued a landlord's warrant to collect his rent in arrears.

After the levy by the constable under the landlord's warrant, and before the expiration of the five days allowed the tenant or the owner of any goods on the premises to replevy, and before an appraisement had been made, the defendant, John E. Morgan, claiming to be the owner of the piano which was in the possession of the tenant under a lease or bailment, removed the piano from the premises without the knowledge of the landlord or the constable.

When the constable at the expiration of five days after the levy came to post his notices of sale, he missed the piano and made a demand upon the defendant for it, which was refused. He thereupon advertised the remaining property on the premises for sale and sold, realizing the sum of \$15 dollars at the sale which was subsequently held, out of which he kept \$4.50 for costs and paid to the plaintiff the balance, \$10.50, to apply on his rent in arrears, which amounted to \$92, leaving a balance of \$81.50 still due the landlord.

Plaintiff having shown these facts on the trial, claimed \$81.50, with interest, and the jury brought in a verdict in his favor of \$40.75.

The testimoney as to the value of the piano varied from \$50, placed upon it by the defendant, to \$350, which was the contract price.

The defense set up by the defendant at the trial was that no appraisement of the goods distrained was held by the constable, and that, therefore, the whole proceeding was void and the defendant had a right to remove his property, as there was no lien upon it nor was it in the custody of the law, as would be the

case under a levy by the sheriff on a writ of *fi. fa.* issued out of the Court of Common Pleas. We held that the defendant was not in a position to avail himself of any irregularity in the distress proceedings, and we find no error in the trial. Defendant did not protect himself by giving notice to the landlord when the piano was placed on the premises that the tenant held it under a lease, and that title to the piano was in him, the defendant. Nor did he avail himself of the right to replevy the piano within the five days after the levy, as he might have done. In the lease from the landlord to the tenant there was a waiver by the tenant of an appraisement. This did not affect the defendant, the owner of the piano, without notice to him, but did justify the constable in proceeding without an appraisement in the absence of notice of ownership in the defendant. If he had tried to make an appraisement at the expiration of five days he could not have appraised the piano, because it was not there.

"A stranger who commits a pound breach and cloigns the distress cannot set up a subsequent irregularity in the proceedings as a defense to an action for damages for the rescous. *Hambest v. Heerman*, 2 Walker, 471.

The Court below in answer to the defendant's third point said: "To constitute an unlawful rescous there must be a lawful detainer, but it does not follow that a stranger, who interferes can justify himself by pointing to irregularities or omissions in the proceedings, and particularly when such irregularities or omissions occur subsequently to his act. The detainer in such case is lawful to him at least; we cannot, therefore, charge the jury as we are asked to do in this point."

The judgment entered for the plaintiff in this case was affirmed by the Supreme Court on appeal. Judge Strong in his opinion affirming the judgment in reference to the answer of the Court below to the defendant's third point, says: "The defendant's third point was in all respects correctly answered."

The defendant in the case at bar removed the piano before the five days had expired, when the goods would have been appraised. In other words, as his counsel frankly stated at the trial, he removed his property, taking a chance on there being an irregularity in the proceeding of which he would avail himself to escape liability, because the proceedings being statutory must be strictly followed, and any departure from the prescribed course is fatal; that the failure to hold any appraisement was a fatal defect, and, therefore, the entire proceeding was void and he is not liable.

It is true that the remedy being statutory must be strictly followed, and that any departure from the method prescribed is fatal, but it does not follow that the owner of the property dispossessed who removes the property before the time fixed for an

appraisal and thereby prevents an appraisal of that specific property can thus take advantage of his own wrong. If he had notified the plaintiff that the piano belonged to him when it was placed upon the premises, as he might have done under the Act of 1876, he would have been protected; or if he had notified the plaintiff after the levy of his ownership the plaintiff might have held an appraisement or the defendant might have replevied his piano within the five days. Instead of choosing one of these lawful methods of protecting himself, he chose to take the law in his own hands and remove the piano, and he must therefore suffer the consequences.

The jury were instructed properly that if they found that the defendant had notice of the levy when he removed the piano they might allow the plaintiff treble damages; if not, actual damages. They found a verdict in favor of the plaintiff for \$40.75, which was somewhat less than the lowest valuation placed upon it, but we do not feel like granting a new trial on that ground. The motion for a new trial filed by the plaintiff was not pressed at the argument, which was directed exclusively to the defendant's motion for judgment *non obstante veredicto*.

Plaintiff's motion for a new trial and defendant's motion for judgment *non obstante veredicto* denied.

B. W. Davis, for plaintiff.
M. J. Mulhall, for defendant.

LEVENTHAL *v.* LEVENTHAL.

Husband and wife—Divorce—Physical Defect.

Where a physical condition exists in a wife, rendering her impotent and incapable of procreation, the husband would be entitled to divorce, but where, before hearing, the defect, on testimony of medical experts has disappeared, the libel fails and will be refused.

Common Pleas, Luzerne county. No. 158, December term, 1918.

WOODWARD, J., March 15, 1919.—On October 15, 1918, the libellant in this case filed his libel in divorce, alleging, in the eighth paragraph of the libel, his ground for divorce as follows:

"8. That at the time of the birth of respondent, she was so anatomically deformed as to be incapable of sexual intercourse; that such malformation was congenital and hath been, and is, incurable; that thereby she was at the time of entering into the marriage contract with libellant, is now, and will always be, naturally impotent and incapable of procreation; that your petitioner was innocent of such condition at the time of his marriage; that he has been, and always was, desirous, upon discovering such deformity, to have respondent treated by various physicians and surgeons for the purpose of removing such deformity, if possible:

but libellant has been informed by the various medical men to whom he took respondent for treatment, that such malformation is incurable * * *

By agreement of counsel for the parties the case was tried before the Court without a jury.

In the course of the hearing it developed that the respondent was not anatomically deformed in her genital organs; that her formation was perfectly normal, but that the defect came from an abnormal and involuntary contraction of the muscles * * * a malady well known to the medical profession and termed vaginismus, and amendment to the libel was allowed.

* * * * *

The Act of March 13, 1915, Sec. 1, 6 Sm. 286, provided: "When a marriage hath been heretofore or shall hereafter be contracted and celebrated between any two persons and it shall be judged in the manner hereinafter mentioned that either party at the time of the contract was and still is naturally impotent or incapable of procreation * * * it shall and may be lawful for the innocent and injured person to obtain a divorce from the bonds of matrimony." The amendment brought the case within the purview of the Act.

On the hearing the allegations in the amended libel were proved by two physicians called by the libellant, who testified that the respondent was afflicted with vaginismus, which took the form, in her case, of an involuntary and abnormal muscular contraction * * * and that she was impotent and incapable of procreation. Dr. Stewart had operated on her, but testified that on examination after the operation he found no improvement in her condition. The case was then continued, and on the next hearing before the Court, Dr. Meyers and Dr. Stewart were called by the defendant, the former testifying that he had made several examinations and found the respondent perfectly normal. The respondent then submitted herself to an examination by Dr. Stewart in the presence of Dr. Meyers, and Dr. Stewart corroborated Dr. Meyers and said that her condition had entirely changed since his former examination and that he found her perfectly normal and capable of coition.

On the final hearing it was conceded that for some reason, whether as the result of the operation or some other cause, the condition of respondent had changed and that she was now normal and that the ground for the divorce as alleged in the libel and the amendment thereto had ceased to exist.

* * * * *

Libellant having failed in his proofs, the decree of divorce is refused and the libel is dismissed at the costs of the libellant.

E. H. Sheporwich, E. G. Butler, F. A. McGuigan, for libellant.

R. L. Levy, A. Salzburg, for respondent.

IN RE SALE REAL ESTATE PETTEBONE.

Judgments—Trustee—Validity—Preference in assignments.

Judgment to a trustee, not being within the statute forbidding preferences in assignments, is valid, except where fraud, collusion or lack of consideration is shown or intention to delay and defraud creditors.

Exceptions to distribution. Common Pleas Luzerne county. No. 863, May term, 1916.

GARMAN, J., May 27, 1918.—January 12, 1918, the sheriff of Luzerne county sold real estate of Jacob S. Pettebone for the sum of \$4,025.

The sale was made on a *fi. fa.* issued upon a judgment No. 863, May term, 1916, on a note containing a confession of judgment by J. S. Pettebone to J. Q. Creveling, trustee.

The attorney for the Union Petroleum Co. excepted to the schedule of distribution by paper filed as follows:

STATEMENT OF FACTS, VIZ.

First. On January 12, 1918, said sheriff sold the real estate of J. S. Pettebone to D. A. Fell, attorney, for \$4,025.

Second. Said sale was on a judgment confessed to 863, May term, 1916, by J. S. Pettebone to J. Q. Creveling, trustee.

Third. The said judgment was confessed shortly before the entry of the judgment of the Union Petroleum Co., No. 835, March term, 1916, and after a judgment in favor of R. Blanche Ruggles, No. 713, March term, 1916.

Fourth. The confessed judgment is dated May 4, 1916, and the Union Petroleum Co. judgment is dated July 12, 1916.

Fifth. There is nothing on the record to show for whom J. Q. Creveling was trustee.

EXCEPTIONS.

1. The judgment of the Union Petroleum Co. should be paid before any distribution of the fund to the confessed judgment.

2. J. S. Pettebone could not create a preference in favor of anyone under the facts set forth in the records.

Wherefore your exceptant claims that the judgment of the Union Petroleum Co. entered to No. 835, March term, 1916, be allowed distribution in the fund aforesaid after allowance of costs and payment of the judgment of R. Blanche Ruggles, No. 713, March term, 1916."

The confession of judgment to a trustee is valid and is not within the statute forbidding preferences in assignments. *Guy v. McIlree*, 26 Pa. 92.

To secure an issue a complaining creditor must show that the judgment is fraudulent, collusive and without consideration and intended to hinder, delay and defraud creditors. *Moore v. Dunn & Fell*, 147 Pa. 359.

The petition is dismissed.

T. Darling, for company.
J. S. Jenkins, for Pettebone.

IN RE GRIFFIN, LUNATIC.

Lunatic—Attorney's claim against estate—Contract for services—Committee—Voluntary services—Jurisdiction of Court.

1. Where surviving brothers and sisters of one deceased, together with the children of one surviving brother adjudged a lunatic and under guardianship, make agreement with attorney for one-fourth of money recovered by his efforts from estate of deceased, and definite sum is recovered, all parties in interest paying the one-fourth as agreed, and committee in lunacy assenting to attorney's services and reasonableness of the claim, and
2. Where overseers of the poor present counter claim against lunatic's estate for care and maintenance of lunatic, which if allowed would decrease attorney's compensation—

Held, That claims founded upon contracts against the estate of a lunatic in the hands of a committee can be decided by the Court having jurisdiction of the accounts of the committee.

Children of lunatic having assented to terms of agreement with attorney, such attorney's services cannot be called voluntary.

Parties in interest having paid attorney's claim on basis as above, the reasonableness of the claim is fairly established.

Attorney has a lien upon the fund to entitle him to compensation, and Court will award the said proportionate amount to attorney from estate of lunatic.

Petition for counsel fees. Common Pleas, Luserne county. No. 199, October term, 1918.

GARMAN, J., July 15, 1919.—April 7, 1919, R. L. Levy, a practicing lawyer in the city of Scranton, presented to this Court a petition for the allowance of counsel fees from the estate of Lester Griffin, a lunatic.

On the presentation of said petition, a rule was granted to show cause why the prayer of the petitioner should not be granted, which rule was made returnable on April 21, 1919, at 11 o'clock a. m., in court room No. 2.

At the time and place named in the rule, there appeared before the Court, R. L. Levy, Esq., petitioner; H. J. Mahon, Esq., guar-

dian of said Lester Griffin, lunatic, and W. W. Hall, Esq., representing the overseers of the poor of the poor district of West Pittston borough.

The facts on which the petition for allowance of counsel fees is based are as follows:

That in October, 1916, Benira Griffin, resident of West Pittston, Luzerne county, died testate, leaving to survive him a widow and five living brothers and sisters, all adults, one of said brothers being said Lester Griffin confined in Danville Insane Asylum.

That on August 2, 1918, on petition of W. D. Owens and William B. Richards, overseers of the poor of West Pittston borough poor district, the said Lester Griffin was by the Court duly found to be "so far deprived of his reason and understanding that he was rendered altogether unfit and unable to govern himself and has become incapable of managing his estate," and Harold J. Mahon was appointed guardian of said Lester Griffin.

That the other surviving brothers and sisters, together with two adult children of Lester Griffin, employed R. L. Levy, the petitioner herein, to represent them in proceedings to recover for them, if possible, a part of the estate of said Benira Griffin, deceased, the agreement being that Mr. Levy was to receive as compensation for his services a sum equal to 25 per cent. of any moneys obtained in such proceedings.

That through Mr. Levy's efforts there came into the estate of Benira Griffin the sum of \$75,000, which at the audit of said decedent's estate the Orphans' Court of Luzerne county awarded to the estate of said lunatic, Lester Griffin, the sum of \$4,929.98.

That the other heirs paid to Mr. Levy from their respective shares the compensation agreed upon.

That the adult children of Lester Griffin having agreed to the said compensation and the estate of Lester Griffin having benefited by the services rendered, Mr. Levy claims 25 per cent. of the moneys paid to the estate of Lester Griffin, lunatic, from the estate of Benira Griffin, deceased.

In answer to the petition of R. L. Levy, H. J. Mahon, guardian of Lester Griffin, says:

That to the best of his knowledge and belief all the allegations in the Levy petition for counsel fees are true and correct.

That he has personal knowledge of the services rendered by R. L. Levy in the matter of the settlement of the estate of Benira Griffin, deceased.

That the estate of Lester Griffin was proportionately benefited and advantaged by such services: and that under the circum-

stances the counsel fee asked, to-wit: 25 per cent. of the fund secured or accumulated, is just and reasonable.

That he has no objection to payment of counsel fees requested other than that as a matter of proper procedure such payment should first be authorized and directed by the Court.

On April 21, 1919, at the time set for the hearing of the Levy petition, there was presented to the Court a petition of the overseers of the poor of the West Pittston poor district asking to intervene and become a party to the record reciting as follows:

That said district is interested in the estate of Lester Griffin, lunatic, in that said district has contributed to his maintenance and support since July 15, 1891, at Danville State Hospital for the Insane.

That the sums so paid amount to nearly \$2,500.

That suit has been brought by said district against the guardian of said lunatic and said suit is now pending.

That they are informed and believe that the State of Pennsylvania has presented a claim of \$2,800 for maintenance of said Griffin.

That the estate of said lunatic amounts only to \$4,929.28, as awarded by the Orphans' Court of Luzerne county.

That notice of Levy's rule for counsel fees was received through the guardian of said lunatic.

That said Levy's claim should not be allowed because he performed no services for the estate of Lester Griffin but his services were performed for the clients who engaged him and no person had authority to enter into any agreement with him for the payment of any services he might render in behalf of Griffin's estate.

That if Levy's claim be allowed the fund will be diminished and the poor district suffer therefrom; and, that the claim of 25 per centum of the fund awarded is unreasonable, excessive, and out of all proportion to the character of the services rendered.

The said overseers of the poor formally object to the Court's making any order to the guardian of Lester Griffin to pay said fee to Levy for three reasons:

(1) That the Court is without jurisdiction to dispose of the question of said Levy's compensation in a summary manner as the services which he rendered were not rendered in connection with the proceedings in lunacy.

(2) That under the averments of the petition on which the rule was granted, the services alleged to have been granted to the estate of the lunatic were voluntarily rendered, in that the people employing said Levy had no authority to bind said lunatic, and there has been and can be no ratification.

(3) The amount is excessive.

The first reason: This concedes the jurisdiction of the Court to determine the proper amount due to an attorney for the services which he rendered in connection with the lunacy proceedings; but denies the authority of the Court to control, upon petition, the value of an attorney's services in the present case. We think this position untenable. In Price's Appeal, 116 Pa. 410, the Supreme Court has decided that in the case of contracts made with the committee of a lunatic, respecting the person or estate of the lunatic, it is clear that claims founded upon such contracts against the estate of the lunatic in the hands of the committee can be heard and decided by the Court having jurisdiction of the accounts of the committee.

In McKelvey's Appeal, 108 Pa. 615, it was ruled that where a fund is brought into a court of equity by the services of an attorney who looks to that alone for compensation, though his interest is not of the nature of a lien, he is the equitable owner to the extent of the value of his services, and the Court administering the fund will intervene for his protection, and award him a reasonable compensation therefrom; and the Court may in such case determine itself what is a reasonable fee, without referring the matter to a jury.

In Farr's Estate, 10 Pa. Superior Court, 554, it was decided that a claim which is a necessary expense on a lunatic's estate could properly be submitted to the Court and that the right to charge a fund with costs and expenses depends on whether the litigation in which the costs and expenses were incurred was in the promotion of the interests of those eventually found to be entitled to the fund. If, as said in this case, the ward and his estate are within the care and protection of the Court, why should not the legal questions involved in the claim before us be determined by the economical process of a rule as well as by the more expensive process of an action at law or bill in equity?

When the claim is solely a matter of law, the Court may hear and determine liability of the estate. "The right to charge a fund with costs and expenses depends on whether the litigation in which the costs and expenses were incurred in promotion of the interests of those eventually found to be entitled to the fund." Farr's Estate, 10 Superior, 559.

Second Reason: The testimony shows that the services in behalf of the lunatic's estate were authorized by his family and that the committee later appointed believes the claim just and not unreasonable. There is no doubt that recovery for the estate was made in the sum of \$4,929.88, and this fund is in the hands of the lunatic's committee under the control of this Court. As the children of the lunatic assented to the terms of employment of counsel, we do not consider the services voluntary.

Third Reason: All parties in interest, including the lunatic's

brothers, sisters and children, having agreed to the compensation claim, we are not prepared to say that it is unreasonable or excessive.

The objectors rely upon the following cases: *Wier v. Myers*, 34 Pa. 377, which holds that an action will not lie against the committee of a lunatic to recover compensation for services in conducting the proceedings in lunacy. The case cited does not, however, decide that no recovery can be made from a lunatic's estate; it simply decides that such a claim can be disposed of by the Court without action at law.

Dubois' Appeal, 38 Pa. 231, which decides that an attorney has no lien on a fund in court that was not brought there through his agency and was never in his hands. *Dubois' Appeal* does not apply to the case before us, because here the claimant was instrumental in bringing the fund into court.

Rogers' Appeal, 119 Pa. 178, decides that both creditor and committee of a lunatic have the right to ascertain by due course of law the validity of a claim, the committee contesting the claim. Here the committee is not contesting the creditor's claim, but one creditor is contesting another creditor's claim, with the committee testifying to the fact that the attorney's services were instrumental in securing the fund for the lunatic's estate and that the services were worth the amount claimed.

Railroad Company v. Guarantor's L. I. Co., 206 Pa. 350, while recognizing the doctrine that a chancellor has power to direct the payment of reasonable counsel fees out of a fund for distribution when the fund is the product of the attorney's labors and he has agreed to look to it solely for compensation, the case was decided against the attorney, because under the circumstances of the case he had no lien upon the fund.

Jones v. Woods, 76 Pa. 408, affirms the well known principle that a voluntary service rendered by one man to another without any precedent request, or subsequent promise, forms no ground of action. But the ruling is not pertinent to the case before us, because here the action was in behalf of a lunatic without a guardian, the children of the lunatic agreeing that the compensation might be paid from the lunatic's estate as recovered and the bill was afterward approved by the committee, and the fund created or recovered by the claimant is in the hands of the committee acting for the Court.

We are of the opinion that under the circumstances the attorney has sufficient lien upon the fund to entitle him to his compensation; that the compensation is not excessive; and that we have the power and authority to direct its payment.

It is, therefore, ordered that Harold Mahon, guardian of Lester Griffin, lunatic, pay to R. L. Levy, Esq., the petitioner, the sum of \$1,232.49 out of the fund in hands of said guardian belonging to said lunatic.

INTERSTATE FILMS CO. v. VANLEUVAN.

Contract—Moving picture theatre—Reels.

Affidavit of defense by owner of moving picture theatre to suit for reels furnished, and in which credit is claimed in a lump sum for failure of plaintiff to furnish at all, or to supply reels of guaranteed age, is insufficient, lacking definite specification of dates when reels were not furnished, their particular individual value, what reels were omitted, and what number, and lacking information on which a fair credit reduction could be estimated.

Rule for judgment for want of a sufficient affidavit of defense.
Common Pleas, Luzerne county. No. 887, March term, 1919.

GARMAN, J., July 14, 1919.—Plaintiff claims the sum of \$342.25, with interest, from October 7, 1916, as follows: \$330 rental due for films, and \$12.25 for certain carbons purchased.

By the affidavit of defense filed July 2, 1917, defense is made:
(1) A claim of credit for \$45.83 charged by plaintiff in bill for July 3, 4, 11, and August 2 and 18, because on said dates plaintiff failed to furnish the reels agreed upon and thus obliged defendant to purchase reels elsewhere.

(2) A claim of credit for \$484.72. This credit is claimed on the ground that plaintiff agreed to furnish reels of the age of twenty-six days. The defendant avers that plaintiff daily furnished two reels which were from forty to eighty days old and of less value than the reels agreed upon; that defendant from time to time notified plaintiff of this fact and objected to the age of the two reels daily and plaintiff upon several occasions agreed with defendant to make a proper reduction because of the age of said reels; that as the contract price of said reels was \$1.83 each and their fair market value \$1.00 each, the defendant is charged for the two reels \$1.66 per day more than the actual value of the same; and that for 292 days, the full number of days which defendant used said reels he is entitled to the credit aforesaid of \$484.72.

(3) A claim of credit for \$50.00 because plaintiff repeated the service twelve times during the term of the contract.

By the supplemental affidavit of defense, defense is made:

(1) A claim of credit of \$146.40 for eighty reels which defendant alleges plaintiff failed to furnish in May, thirteen days; June, twenty-one days, and July, four days. Defendant alleges that his contract with plaintiff was for five reels daily; that on each of said days plaintiff furnished only three reels; that the reels cost \$1.83 each; that defendant objected to and notified Terence Tracey, manager of plaintiff company, of their failure to furnish defendant with the two reels on the said days; and that Tracey promised and agreed with defendant that a reduction would be made in defendant's account of the amount of the cost

of these reels per day, to-wit: \$3.66 because of plaintiff's failure to deliver these reels.

(2) A claim of credit of \$141.93 for 171 reels from forty to eighty days old and of less value than reels twenty-six days old. Defendant avers that instead of being worth \$1.83 each they had a fair market value of less than \$1.00 each; that defendant objected, complained and notified Tracey of the age of said reels and Tracey promised and agreed with defendant on several occasions between July 10, 1916, and February 23, 1917, that they would be charged to defendant at their actual value at time when delivered to him.

(3) A claim of credit of \$250.00 for damages because of plaintiff's failure to deliver the five reels of the age of twenty-six days as per the agreement. Defendant avers that by plaintiff's failure to furnish the reels, he was compelled, in order to keep his theatre open, to purchase film service from other companies at a cost of \$5 to \$10 a day, which was a fair, reasonable rate of charges in the market on said days.

The two affidavits vary widely.

The affidavit of defense was clearly insufficient. In the first paragraph, the credit claimed was in a lump sum for failure on part of plaintiff to furnish the reels agreed upon for July 3, 4 and 11, and August 2 and 18. There is nothing to indicate what reels nor how many reels were omitted nor their value.

The second part of the affidavit was insufficient. There were no dates given for the agreements alleged to have been made with defendant to make a proper reduction; no suggestion of the person acting for the plaintiff; and no idea is afforded as to what was to be "a proper reduction".

The third part was insufficient because of indefiniteness and failure to specify the repeated reels.

Realizing the strength of plaintiff's exceptions, defendant asked leave to file a supplemental affidavit of defense, which request was granted.

As we have seen the supplemental affidavit is in gross variance with the original affidavit of defense and nothing is given in the supplemental affidavit to explain this variance. In such a case the Superior Court has said: "We can easily imagine that a defendant might honestly swear to an allegation which he afterwards finds is not correct. In such cases it would seem that when he subsequently changes his position he should afford some explanation as to why he has assumed a different attitude in regard to the question. 'An affidavit of defense must not be self-contradictory. It is argued that an original and a supplemental affidavit of defense are to be construed as one affidavit, and, therefore, when, without explanation, the supplemental affidavit contradicts the averments of the original in matters essential to a valid defense, the Court is warranted in holding that they are insuffi-

cient to prevent a judgment. This may be conceded as a general proposition." *Elzea v. Brown*, 59 Superior (Pa.) 403.

We feel, therefore, bound by this authority to make the rule for judgment absolute.

S. M. R. O'Hara, for plaintiff.
J. T. Lenahan, for defendant.

KLEIN *v.* SCROGI.

Judgment—Husband and wife—Death of one party—Execution.

Where judgment has been entered against husband and wife, and three years after *fi. fa.* against both, though the husband has died meantime, writ of *fi. fa.* will on petition be quashed. There can be no execution in such case without first issuing *sci. fa.* against the husband's legal representatives.

Rule to quash or set aside writ of fi. fa. Common Pleas, Luzerne County. No. 1016, March term, 1914.

GARMAN, J., July 14, 1919.—February 13, 1914, plaintiff sued John Scrogi and Sophia Scrogi before George M. Thomas, alderman, claiming \$97.58, balance on an account for goods sold and delivered to defendants by plaintiff and judgment was obtained against them for said amount.

On March 11, 1914, defendant appealed, the transcript not showing which defendant appealed; but the transcript was filed in the interest of both defendants on March 16, 1914.

On January 25, 1916, the case being at issue, it was by agreement referred to G. Fred Lazarus, Esq., under the Act of 1869, P. L. 725, and its supplements.

April 6, 1916, the referee filed his report directing judgment for the plaintiff and on same day judgment was entered against both defendants in said sum of \$97.58.

January 30, 1919, plaintiff had *fi. fa.* issued and levy was made upon personal property.

February 18, 1919, sale having been fixed for February 19, 1919, Sophie Burszewich, formerly Scrogi, and one of the defendants in the original action, presented her petition setting forth that John Scrogi died about September 28, 1916, and that the levy on the *fi. fa.* was made on personal property belonging to Jacob Scrogi and John Scrogi, Jr., and in their actual possession and control; and petitioner prayed for a rule to show cause why the writ of *fi. fa.* should not be quashed or set aside. This rule was allowed and is now before us for consideration.

The Act of Assembly relating to referees requires as follows: "The report of the referee upon a question of law and fact shall be filed together with the whole testimony taken and bills of exceptions sealed in the office of the prothonotary, and, in order to give all parties in interest an opportunity of entering exceptions to findings of fact or law and to the admission or rejection of testimony for which bills have been sealed, no referee shall file his

report until ten days after he has notified to the parties his intentions so to do on a day designated and giving them an opportunity of having access to such report."

Under ordinary circumstances this is the course that must be strictly pursued because it is the requirement of the statute, but in the case before us the referee's report and the record show as follows: "Before the referee, Mr. Schmidt, counsel for the defense, states that he can make no defense unless the same is defendants' right to call upon the statute of limitations, and after investigation it is admitted that the statute would be no bar, and by agreement before the referee it was agreed that judgment could be directed to be entered for the amount of the claim as stated in the transcript, but without interest to be reckoned thereupon, costs to be taxed."

This agreement of counsel amounts to a waiver of the provisions of the statute as to procedure. It was given, too, apparently for a consideration beneficial to the defendants, to-wit: the avoidance of interest from the time of the entry of judgment by the alderman to the entry of judgment by the referee.

We are, therefore, of the opinion that as to the entry of judgment upon the same day that the referee's report was filed, there can be no objection.

The *f. fa.* issued against John Scrogi and Sophia Scrogi, both defendants in the judgments, but as it is clearly shown that John Scrogi is dead there can be no execution as to his estate without first issuing a writ of *sci. fa.* against his legal representative.

The judgment was against John Scrogi and Sophia Scrogi, and, therefore, the execution must be against John Scrogi or his legal representatives and Sophia Scrogi.

"It is a rule of law that the execution must agree with the judgment; so that if the judgment is against several defendants, the execution must be against all of them; and it is error if any one is omitted. The writ must go against all, but the estate of any one, although his separate property, may be seized by the officer and sold." Gibbs *v.* Athensin, 1 Clark, p. 478.

The plaintiff relies upon Sheetz *v.* Wynkoop, 74 Pa. 198, in support of his theory that he may have execution against Sophia Scrogi by quashing the writ as to John Scrogi; but we are of the opinion that the ruling in Sheetz *v.* Wynkoop is based only upon the facts and conditions of the case and that the principle that the execution must be joint when the judgment is not affected.

In Pomeroy *v.* Sterrett, 183 Pa. 17, the writ was directed against three of a number of defendants and the Court ordered the sheriff to collect of each of three only his proportional share of the whole debt; and we would follow that course but for the fact of the death of John Scrogi.

The rule to quash the *f. fa.* is made absolute.

D. Rosenthal, G. L. Fenner, for plaintiff.
S. M. R. O'Hara, for defendant.

IN RE REVOCATION ADOPTION OF RUTSTEIN.

Adoption—Minor child—Revocation of decree.

Where a child has been legally adopted by a husband and wife, the child's father having deserted his family, and mother consenting to adoption, and mother re-marries, and petitions for custody of the child and revocation of decree of adoption:

Held. That revocation will be refused where child is contented, is suitably cared for and educated, and where, though foster parents have been divorced since the adoption, each is sharing the maintenance of the child, and where the natural mother has three step-children, having been subsequently married, one child of her own besides the one adopted, and expectancy of other children.

Common Pleas, Luzerne county. No. 401, October term, 1914.

GARMAN, J., July 12, 1919.—June 3, 1914, Samuel Cohen and Mary Cohen presented their petition to the Court asking for the adoption of Pauline Rutstein, then five years of age, and averring "that Frank Rutstein, the father of said child, has deserted said child and has neglected and refused to provide for the said child for a period of more than one year, to-wit: from December 31, 1912, and that Anna Rutstein, the mother of said minor child, has consented to such adoption."

To this petition was annexed the following signed statement of Anna Rutstein, mother of the child mentioned in said petition: "I, Anna Rutstein, mother of Pauline Rutstein, hereby signify my consent to the adoption of the said Pauline Rutstein as prayed for in the foregoing petition and believe that such adoption will be for the child's welfare."

In accordance with the prayer of the petitioner adoption was decreed on said date, to-wit: June 3, 1914, and the child was received and cared for from that date by the adopting parents.

April 19, 1919, the petition of the mother of the said child and the one now under consideration was presented to the Court praying for a revocation of the said decree of adoption. This petition averred:

(1) That the petitioner is the mother of Pauline Rutstein and is now intermarried with Samuel Sare and a resident of Altoona, Pa., and at the time of the adoption of the said Pauline Rutstein was financially unable and in such delicate health as not to be able to take care of her daughter Pauline, who was at that time five years old.

(2) That since the adoption of Pauline Rutstein by the said Samuel and Mary Cohen, the petitioner's health has so improved

and her circumstances so changed as to warrant her in taking care of her said daughter and supporting her the rest of her life so that the said Pauline Rutstein shall receive the care of a mother and that she shall receive all the benefits of the laws of Pennsylvania which a child is entitled to from her parents.

(3) That since the adoption of the said Pauline Rutstein, Samuel Cohen and Mary Cohen have, by decree of the Court of Common Pleas, No. 135, January term, 1919, dated March 10, 1919, been divorced as man and wife.

(4) That the said Pauline Rutstein at the present time has no home and is not receiving the attention of a mother's care and love; that neither Samuel Cohen or Mary Cohen are looking after her interest, but she has been placed in the home of one Mrs. Samuel Mendelsohn in the city of Wilkes-Barre.

(6) That there has been no change in the property rights of Pauline Rutstein and no property has vested in her nor is there any possibility that any property of Samuel Cohen or Mary Cohen will vest in her.

Upon this petition a rule was granted to show cause why the decree of adoption should not be revoked as prayed for.

The facts averred in the first, second and third paragraphs of the petition are not disputed but the averment that the said child, Pauline Rutstein, at the present time has no home and is not receiving the attention of a mother's care and love and that neither Samuel Cohen or Mary Cohen are looking after her interest, is denied.

The testimony of the petitioner shows that Frank Rutstein, the father of Pauline Rutstein, the child in question, deserted his wife and child say more than a year before the decree of adoption. Therefore, under the provisions of the Act of Assembly, his wife, then Anna Rutstein, now Anna Sare, had the right to agree to an adoption.

The testimony further shows that the petitioner, Anna Rutstein, now Sare, consented to the adoption; that she became divorced from her said husband, Frank Rutstein, and is now married to a man by the name of Samuel Sare; that Sare has three children by his former wife; that the said Anna Rutstein Sare has two children by her former husband, Rutstein, including the child in question, Pauline, and is about to become a mother by her present husband; that the child Pauline has a good home, is sent to the

public and Sunday schools regularly, is being given a musical education at the Convent of Mercy and is apparently satisfied with her present situation. It is also shown in the testimony that Samuel Cohen and Mary Cohen are both opposed to the revocation of this adoption and that both are sharing in the support of the said child.

These facts being conceded, the only question involved in the case is whether the fact of a divorce between Samuel Cohen and Mary Cohen is sufficient ground to revoke this adoption.

That the Court has the right to revoke an adoption is without question. Revocations are usually made where fraud or undue influence is shown, where there is a want of consent on the part of the child's parents, and where the welfare of the child will be promoted by the revocation. The application for a revocation, however, must be promptly made.

The petitioner relies upon the rulings in certain cases, to-wit:
(a) Collier's case, 19 Luzerne, 111.

In this case the adoption was made on August 28, 1916, and the application for revocation was made on March 6, 1917. The testimony in support of the petition elicited the fact that the mother was not fully aware of the purport of the papers and had no intention of permitting an adoption. While the Court might have held that her failure to understand the purport of the petition was not sufficient to revoke it, still where there is an apparent misunderstanding or fraud, the Court is always ready to correct its own error.

(b) *Booth v. Allen*, 7 Phila. 401, simply decides that a decree will be revoked when it is obtained by fraud or misrepresentation.

(c) *Vanderiis v. Gilbert*, 10 Superior Court, 570, where the ruling was that in order to justify an adoption the consent of the parents or surviving parent must be given.

(d) *In Re Daniel Blair, Jr.*, 11 Weekly Notes Cases, 239.

In this case the revocation was agreed to by the adopting parent.

(e) *In Re Adoption of Matilda Smith*, 14 District Reports, 769.

In this case, adoption was refused because of failure to set forth the necessary facts.

Having fully considered all the testimony, we are of the opinion that no sufficient cause is shown to justify the revocation of this adoption. The adopting parents both declare their ability and willingness to support the child and there is no allegation or suspicion of fraud in the proceedings.

The rule to revoke is therefore discharged.

D. Rosenthal, for petitioner.
H. L. Freeman, contra.

CHOMA v. MANS *et al.*

Equity—Satisfaction of mortgage—Minor—Fraud and collusion of parents.

Where a minor executes and delivers a mortgage to secure a debt payable in two years, and after arriving at maturity brings bill to compel satisfaction of the mortgage, bill containing no averment of fraud practiced upon him, and circumstances indicating a scheme between parents and the minor son to satisfy a former mortgage with proceeds of the later one, and then to repudiate the minor's act—

Held, That equity will not hear one who as result of imposition retains the benefit of a fraudulent enterprise. Plaintiff is entitled only to his day in court to defend against the obligation. If mortgage is a cloud on title it is the plaintiff's fault.

Striking from the record would be the remedy for fraud perpetrated on a mortgagor by a mortgagee. Prayer in bill *supra* should have been to nullify the record of mortgage.

Bill, answer and replication. Common Pleas, Luzerne county. In Equity. No. 7, March term, 1917.

STRAUSS, J., February 20, 1919.—The single proposition presented by this bill in equity may be briefly stated thus: On May 27, 1912, the plaintiff executed and delivered to one of the defendants a mortgage to secure a debt of \$1,500, payable at the end of two years, and meanwhile in monthly instalments, with interest at 6 per cent., and because on that date the plaintiff was under the age of twenty-one, he prays this Court to compel the defendant to appear in the recorder's office to satisfy the mortgage. The bill contains no averment that the mortgage was obtained through any fraud practiced upon the plaintiff or through accident or mistake. On the contrary, the averments of the bill, if they show anything of a fraudulent character, show that the defendants were the victims. The proof established the fact that on May 11, 1912, the property was subject to two mortgages given by the mortgagor's parents to James E. Roderick and to a judgment in favor of J. H. Vincent; the total debt at the time on all of these incumbrances amounting to \$1,041.45. The parents had no money at the time and made the conveyance voluntarily to the mortgagor, so that he might save the property for them. They knew of the plaintiff's application to George Mans, one of the defendants, who is doing business under the name of the American Loan & Credit Company, for a loan of \$1,500, and they along with the plaintiff received checks from Mans for the payment of the Roderick mortgages and for \$269.04, which the mortgagor ultimately received and applied to his own use, and

these checks they endorsed and joined with the plaintiff in applying for the purposes for which they were drawn. Shortly after the mortgage was made, it was assigned to Charles A. Mans, the other defendant.

(The adjudication as filed contains answers to plaintiff's and defendants' requests for findings of fact, the general outcome of which has been substantially stated.)

This transaction which in the proceeding before him, our colleague, Judge O'Boyle, justly characterized as "very peculiar", presents phases that suggest a well planned conspiracy between his parents and this plaintiff while a minor to inveigle some unsuspecting stranger into loaning on a new mortgage, to be made by the minor, money for the satisfaction and payment of existing incumbrances against the parents' title, and then after accomplishing the purpose to repudiate the minor's act and to have it nullified by judicial decree. If such a conspiracy were clearly established the transaction in its totality would fall short of its purpose because the minor would have been a mere instrument or agent to carry out the parents' plan, and the mortgage might have been regarded as, in fact, their own act, though signed and executed in the name of the minor. If, however, the evidence should be held to fall short of proving actual conspiracy, it might nevertheless be sufficient to create an agency in the minor, to carry out what his mother testified was the object of the deed to him, namely, to save the property for the parents, because they had no money. In line with this the parents must have been aware that their son would somehow get the means to pay the Roderick and Vincent liens. Thus they might be held to have intended that he, while a minor, should make a mortgage and apply the proceeds on the payment of their debts. These questions, however, are not before us. They are merely suggested, because, as a matter of fact, this plaintiff did "save the property" by applying the proceeds of the Mans mortgage to the satisfaction of the liens against his parents, \$978.50 in payment of the Roderick mortgages and \$62.95 in payment of the Vincent judgment, making a total of these two items \$1,041.45. As to this amount at least, justice would seem to demand that a Court shall find some way to preserve and enforce its lien against this land, though whether defendant must ultimately lose the cash (\$269.04), which plaintiff

applied for his own personal use is doubtful, as checks were to parents and the plaintiff jointly.

However that may be, the immediate question before us involves only the right of a plaintiff in equity to obtain a decree for the satisfaction of a mortgage obtained without fraud, accident and mistake, and whether such satisfaction can be compelled without proof of payment.

Satisfaction entered upon the record by a mortgagee imports payment. A striking from the record and not satisfaction of the mortgage would be the remedy for a fraud perpetrated on a mortgagor by a mortgagee. The prayer in the bill should have been that the record of the mortgage be nullified. He who comes into equity must come with clean hands. He who seeks equity must do equity. The appeal to the court of equity is an appeal to conscience, and he who would reach the conscience of a chancellor must come with his own void of offense. *Reynolds v. Reynolds*, 202 Pa. 647. The chancellor will not hear one who as the result of imposition on the ignorant and the unsuspecting, retains the benefit of a fraudulent enterprise. Equity will leave such parties in exactly the position in which they have placed themselves, refusing all affirmative aid to either of the fraudulent participants. *Pomery*, Sec. 401.

This plaintiff has no need for equity to relieve him. The law furnishes a perfect protection. The mortgage was not void; it was at most voidable. The plaintiff is not entitled to have it surrendered but only entitled to have his day in court to defend against it. It may be that in a proceeding upon the mortgage upon the law side, the mortgagee, as plaintiff, will be met with the plea of *res adjudicata*, on the ground that his rights were settled by the adjudication in No. 1531, October term, 1912. Be that as it may. The defendant is entitled to hold the mortgage and the plaintiff is not entitled to have it removed as being a cloud upon the title. If it constitute a cloud, it is not the defendant's fault but the plaintiffs, and it is the one inconvenience which this plaintiff must suffer as the result of a voluntary act committed while he was a minor.

The law does not invariably open a door of escape from the consequences of one's act done during infancy though unconfirmed after majority. As long ago as *Zouch v. Parsons*, 3 Burrows, p. 1802, Lord Mansfield announced that "a third rule deducible from the nature of the privilege of infancy, which is given as a shield and not as a sword, is that it shall never be turned into an offensive weapon of fraud or injustice."

Story's Eq. Juris., Sec. 240, citing this case in the footnote, stated that: "Generally infants are favored by the law, as well as by equity in all things, which are for their benefit, and are saved from being prejudiced by anything to their disadvantage.

But this rule is designed as a shield for their protection. It is not allowed to operate as a fraud or injustice to others."

Pomeroy Eq., Sec. 945, declared that: "Fraud will prevent the disability of infancy from being made available in equity."

This doctrine arises out of many cases cited in *Cory v. Gercken*, 2 Maddock's 362, in which a married infant by the solicitation of himself and his brother obtained a transfer of stock from trustees a few months before he became of age. The validity of this transfer coming into question afterwards, it was held that the concealment of his infancy was fraud and precludes him and his assigns, who stand precisely in his situation from calling for a repayment, citing for this *Watts v. Cresswell*, 9 Bin. 415 (Lord Cowper) that: "If an infant is old and cunning enough to contrive to carry on a fraud, he ought to make satisfaction for it."

We have carefully examined the many citations in plaintiff's brief. Not one of them presents an instance where a minor, as plaintiff in equity, seeks to set aside a contract or conveyance; much less to obtain an order upon a mortgagee or creditor to certify a satisfaction of a written evidence of debt without offering payment thereof. Thus in *Wilt v. Welsh*, 6 Watts 9, the action was a declaration in trover to recover the price of a horse, and the right to plead infancy was sustained.

To the same effect is *Penrose v. Curren*, 3 Rawle 352, the action being against an infant who had hired a horse to go to one place and went to another and killed the animal.

Curtin v. Patton, 11 S. & R. 305, was an action on a contract of suretyship made by the defendant while a minor.

Spangler v. Houpt, 53 Superior 545, was trespass for deceit against a minor, and involved a purchase of lumber by a minor, who as his father's successor, continued the business and so stated in a letter by which lumber was ordered, the Superior Court stating that there was no warrant for inferring that the letter was intended as a representation of the defendant's age.

Elm City Co. v. Houpt, 50 Superior 489, decides that where a firm consists of persons of full age and a minor, the plea of infancy will not prevent judgment against the firm, nor collection from the firm property, but the judgment will be limited as not being binding upon the minor individually.

Williams v. Baker, 71 Pa. 476, sustains the right of a minor to bring action of ejectment to recover land during minority.

We shall not analyze the other cases cited, but content ourselves with the statement already made that none of them involves the question now before us. It has been pointed out that the mother's testimony establishes a purpose to save the property for themselves through the conveyance to the minor, notwithstanding their indebtedness and inability to pay. The participation of the

parents in receiving the checks and in applying them to the payment of their own debt clearly proves their knowledge of this transaction during the plaintiff's minority, and that they aided and abetted him in carrying it out. Surely there are sufficient indications of actual fraudulent purpose in which this plaintiff joined to warrant us in declining to take jurisdiction upon his complaint, and to leave him to the remedy of law, viz.: the right to defend against the mortgage when suit shall be brought thereon, and meanwhile to leave him in the situation in which he has put himself.

Much attention has been given by the plaintiff to the proposition that the proceeding to No. 1531, October term, 1912, is conclusive in this case as being *res adjudicata*. Upon the validity of that proposition as a defense to *scire facias sur* mortgage, we express no opinion, but by it plaintiff has not obtained an affirmative right for an equitable remedy.

We therefore report the following

CONCLUSIONS OF LAW:

First. Under all the evidence in the case the plaintiff is not entitled to a remedy in equity, and the bill should therefore be dismissed.

Second. The plaintiff is not entitled to have the mortgage satisfied.

Third. The plaintiff's first request for finding of law, viz.:

"1. The adjudication by the Court, filed August 25, 1913, in the suit to No. 1531, October term, 1912, on the bond accompanying the mortgage involved in this action, declaring the bond and mortgage void and striking off the judgment is conclusive in this case and entitles the plaintiff to the relief prayed for," is refused.

Fourth. The plaintiff's second request for finding of law, viz.:

"2. The mortgage having been given by the plaintiff while a minor to secure payment of borrowed money and for business is voidable and the plaintiff having proceeded with reasonable promptness after arriving at full age to avoid the mortgage is entitled to the relief prayed for," is refused.

Fifth. The plaintiff's third request for finding of law, viz.:

"3. The notice in the guardian's petition to strike off the judgment on the bond during the minority of plaintiff that plaintiff desired to avoid the bond and mortgage followed by express notice of disaffirmance less than two years after plaintiff became of age is sufficient disaffirmance to entitle the plaintiff to relief," is refused.

Ordered, adjudged and decreed that the bill be dismissed and that plaintiff pay the costs.

A. H. Jones, G. J. Clark, for plaintiff.

J. H. Bigelow, for defendant.

MACKIN v. COUNCIL OF EXETER BORO.

Act 1917, P. L. 600—Constitutionality—Borough solicitor—Return from naval service—Reinstatement.

1. Act 1917, P. L. 600, relating to officers of municipalities, employed temporarily in military or naval service of the United States, and recovery of their civil employment after discharge, is in conflict with Art. 6, Sec. 4, Constitution, which provides that appointed officers other than judges of courts of record or superintendent of public instruction may be removed at the pleasure of appointing power. The constitutional provision governs.
2. Where borough council refuses to reinstate borough attorney after latter's return from U. S. naval service, such action becomes equivalent to removal.
3. Where one elected under borough code as borough solicitor for four years, his retention of office is subject to the condition "if not removed." *Ulrich v. Coaldale*, 53 Superior, 246.
4. Mandamus on borough council to reinstate borough solicitor under conditions, *supra*, will be denied.

Mandamus. Common Pleas, Luzerne county. No. 453, March term, 1919.

FULLER, P. J., July 10, 1919.—By this mandamus proceeding the plaintiff, having been honorably detached from the naval service of the United States, and relying upon the Act of June 7, 1917, P. L. 600, seeks reinstatement in the office of borough solicitor for Exeter borough, which he held at time of entry into service.

His petition in substance avers (1) his enrollment in the United States naval service, November 23, 1917, and his order into active duty January 11, 1918; (2) his election on January 7, 1918, by the council as borough solicitor, subject to the borough code of 1915, P. L. 312, for a term not specified by council but fixed by said code at four years; (3) action by the borough council, January 15, 1918, appointing another attorney for the year, with reservation of the position to the plaintiff upon his return; (4) his honorable detachment from active duty on January 2, 1919, by order dated December 23, 1918; (5) refusal of council to reinstate, contrary to said Act of 1917, P. L. 600.

Therefore, averring that "he is without any other remedy at law," he prays that "a mandamus may be issued to the council of the borough of Exeter commanding them to reinstate him as solicitor of the said borough."

The alternative writ was issued and served upon the president of council, who "in his own behalf and in behalf of certain of his colleagues in Council," admitting defendants' refusal to reinstate, made answer in substance as follows:

1. That the appointment of plaintiff on January 7, 1918, was not for the term of four years, but only of one year, expiring the first Monday of January, 1919.
2. That plaintiff is not entitled to reinstatement under the Act of 1917.

Thereupon the plaintiff made reply, without introduction of new matter, and obtained an order of Court directing the prothonotary to prepare a formal issue for trial by jury at the next term of Common Pleas.

The prothonotary did not prepare the issue, but the Court subsequently made the following order:

"And now, March 31, 1919, it appearing to the Court that a jury trial has been demanded by the plaintiff upon the matters hereinafter stated, which have been alleged and denied in the pleadings, it is ordered that the following issues be tried, to-wit:

"1st. Did the Exeter borough council on January 7, 1918, appoint F. M. Mackin attorney for the said borough under the borough code of 1915?

"2nd. Was the said appointment made subject to the borough code of 1915, P. L. 312?

"3rd. Was F. M. Mackin appointed for a period of one year or longer?

"4th. Was F. M. Mackin appointed for a period of four years?

"5th. Was F. M. Mackin to have his position back when he returned from active service?

"6th. Did the term and period for which the said F. M. Mackin was retained as attorney for the borough expire on the first Monday of January, 1919?

"7th. Whether the said F. M. Mackin was in the naval service of the United States and what was the period of time he was in the said service?"

Upon the record thus made up the case came to trial before Court and jury on May 5, 1919, when the following facts were establish by proof, without dispute:

1. The plaintiff, a practicing attorney of this court, was enrolled in the United States naval reserve force on November 23, 1917, and was ordered into active duty on January 11, 1918.

2. On January 7, 1918, the council of Exeter borough elected him borough solicitor by motion crudely recorded as follows: "On motion by Masaris, seconded by Zdnovich, to elect F. M. Mackin borough solicitor, motion carried."

3. On January 15, 1918, after plaintiff's departure in service, the council took action recorded as follows: "A motion was made by Masaris, seconded by Kern, that council get another attorney under the same terms as the former attorney, and that when the former attorney returns he may have his position back if he wants it. Motion carried."

Also, "A motion was made by Kern, seconded by Shultz, that Attorney Hall be elected attorney. Motion carried."

On January 7, 1919, the council took action, recorded as follows: "Motion by Kern, seconded by Zdnovich, to retain W. W. Hall as attorney for the borough for the ensuing year. M. C." (M. C. meaning motion carried)

By virtue of the foregoing action, said W. W. Hall has served and is still serving in the stated capacity.

4. On January 2, 1919, the plaintiff was honorably detached from active naval service by order dated December 23, 1918, to-wit: (Copy of discharge.)

5. Immediately after such detachment he signified informally to all of the individual councilmen, nine in number, but not to council as a body, his desire to be reinstated, but no attention was paid to the request and the answer filed by defendants admits refusal to reinstate.

6. The plaintiff had been previously appointed to the position in January, 1916, for one year, and again in January, 1917, for one year, qualifying upon his first appointment in 1916 by giving bond, but not giving any bond upon either his second appointment in 1917, or his third appointment in 1919, as required in the borough code; and no ordinance has been shown directing the amount of the bond as provided in that code.

His failure to give bond is not specifically averred in the answer nor embraced in the issue as framed by the Court, and is, consequently, claimed by the plaintiff to be immaterial.

7. The plaintiff at the time of his enrollment did not make the statement required in case of dependents by Section 2 of said Act of 1917, and the evidence does not show that he had any dependents which would bring him under that section.

Upon conclusion of the evidence, the case was disposed of as follows:

(1) We instructed the jury to answer the first question specified in the order of Court framing the issues, in the affirmative, thus: "Yes; by resolution or motion of the borough council on January 7, 1918, F. M. Mackin was appointed borough solicitor."

(2) We reserved the second, third, fourth and sixth questions as matters of law, viz.: whether the said appointment was made subject to the borough code of 1915 P. L. 312, for one year or four years.

(3) We instructed the jury to answer the fifth question in the affirmative, thus: "Yes; because it is so specified in the resolution of council on January 15, 1918, viz: 'A motion was made by Masaris, seconded by Kern, that council get another attorney under the same terms as the former attorney and that when the former attorney returns he may have his position back if he wants it. Motion carried.'"

(4) We said to the jury on the seventh question: "The evidence establishes that the plaintiff was in the naval service, that he was enrolled November 23, 1917, going into active duty on January 11, 1918, and detached although not discharged from active duty January 2, 1919, by naval order, a copy of which is incorporated in his petition.

(5) We reserved the right to add, if requested, in the absence of any valid objection, a finding of fact to go upon record in respect to the giving of bond, namely: "Under the undisputed evidence here, plaintiff gave a bond on his first election for the term of one year, January, 1916; was re-elected for the term of one year in January, 1917, without giving any additional bond, and has not since given any bond.

(6) We also added to the findings of fact, although not embraced in the specified questions at issue, that the council refuses to reinstate plaintiff as borough solicitor, he claiming the right of reinstatement under Act of 1917.

(7) We concluded with the announcement that the entire case in all of its legal aspects would be disposed of by the Court later on argument and authority, and thereupon the jury was discharged from the case, without rendering any verdict except the affirmative answer to the first and fifth questions aforesaid.

The foregoing statement discloses in the proceedings certain departures from technical precision on which perhaps we might, if disagreeably so inclined, avoid a decision upon the merits.

For example, the petition does not contain precisely the essential jurisdictional averment that "the petitioner is without other adequate and specific remedy at law," although it does aver, in perhaps equivalent language, that the petitioner "is without any other remedy at law."

The issue instead of emerging naturally from the pleadings, founded upon a return to the alternative writ, was arbitrarily, and without notice to the defendant, framed by the Court in a manner which does not aptly, fully and precisely present all of the legal elements involved, for example, the bonding qualification and the refusal to reinstate, so that upon the trial the case did not seem to be in shape for a verdict in favor of either party beyond a mere answer to the specified questions.

The defendant, however, by acquiescing in the mode of procedure, without invoking any technicalities, has tacitly signified desire for a decision upon the merits, and we think that such a decision should be rendered in a case like the present, where all of the material facts have been brought upon record and where the construction of a beneficent war law is involved.

We, therefore, proceed to state our conclusions.

I. The election or appointment (using these terms interchangeably) of plaintiff as borough solicitor was for the term of four years.

We cannot see the possibility of any other conclusion from the language of the borough code, P. L. 1915, page 402, Section 9, viz: "The borough council on the first Monday of January in any even numbered year, or as soon thereafter as practicable, may elect by a vote of a majority of the members one person

learned in the law who shall be styled the borough solicitor, and who shall serve for the term of four years from the first Monday of January of the even numbered year in or succeeding which he was elected, and until his successor qualifies."

The language "may elect" would, perhaps, make it optional to elect such an officer at all, but does not justify the inference claimed by defendant that if he is elected his term can be made less than the prescribed period of four years.

This conclusion, however, does not militate against the Constitutional right of removal at any time, as hereafter stated.

There is no express proof of plaintiff's election "by a vote of a majority of the members", which would be five, but the inference of such a vote is warranted by the proved facts in the absence of any denial or suggestion of claim to the contrary.

2. The Act of 1917, P. L. 600, Section 1, was plainly intended to cover the case of a borough solicitor who, like the plaintiff, having been enrolled and having entered upon active duty in the naval service of the United States, has during his term of office been honorably detached, has returned home, and is seeking reinstatement.

Said section under proper title provides "that whenever any appointive officer or employee regularly employed by * * * any municipality * * * within the Commonwealth shall in time of war, or contemplated war, enlist, enroll, or be drafted in the military or naval service of the United States, or any branch or unit thereof, he shall not be deemed or held to have thereby resigned from or abandoned his said office or employment, nor shall he be removed therefrom during the period of his service, but the duties of his said office or employment shall, if there is no other person authorized by law to perform the powers and duties of such officer or employee, during said period, be performed by a substitute who shall be appointed by the same authority who appointed such officer or employee, if such authority shall deem the employment of such substitute necessary, etc."

If this patriotic bit of legislation is constitutional, it clearly vests in the officer the right of reinstatement upon return, and it imposes an effective restriction upon the right of removal which would otherwise exist.

Section 2, which provides for the case of an officer or employee "having a dependent or dependents", with a view to their protection, does not apply to the plaintiff, under the proofs in the case, and, therefore, he was not required at the time of enrollment to file the statement in writing therein provided.

The Act does not prescribe any particular process to pursue by formal communication to council or otherwise in seeking reinstatement; and undoubtedly the plaintiff by making known his desire to the individual councilmen, and by their failing to take action thereon, retaining in office another incumbent and refus-

ing to reinstate, was put in position to invoke the benefit of the Act if constitutional.

3. Of course it goes without saying, as a condition precedent, that he should give bond as directed by the borough code, P. L. 403, Section 11, viz: "The borough solicitor shall give a bond to the borough with two or more sureties, or one trust or bonding company, to be approved by the council, in such sum as it shall by ordinance direct, conditioned for the faithful performance of duty." He has not complied with this requirement.

Technically, and ordinarily, perhaps, the giving or tendering of such a bond should precede the petition for mandamus; but in this case we may bear in mind that the plaintiff's departure upon active duty followed close upon his appointment, allowing, perhaps, no opportunity to procure a bond, and seeming to make the giving of one at that time a supererogatory performance, that the parties evidently regarded the original bond given in 1916 as sufficient, and that the defendant now refuses to reinstate on other grounds entirely, under all of which circumstances, although it would be necessary to comply with this requirement before a peremptory mandamus could be issued, the petition might still be maintained.

4. The foregoing conclusions would lead to the final conclusion that the plaintiff should, upon tender of bond, receive a peremptory mandamus as prayed, if, and only if, but quite essentially if, the Constitution does not prevent, and we think it does.

Article 6, Section 4, thereof provides, that "appointed officers, other than judges of the courts of record and superintendent of public instruction, may be removed at the pleasure of the power by which they shall have been appointed."

While this provision uses the term "appointed" and the borough code uses the term "elected", no distinction can be drawn between the two, and plaintiff asserts none, designating himself, indeed, in his petition, as "appointed", and relying for relief upon the Act of 1917, which uses the same term.

Now, the action and attitude of council in this case was the plain equivalent, unmistakably implied, if not actually expressed, of removal, which the Act of 1917 forbids but the Constitution permits.

The former says "Thou shalt not remove", while the latter says, "Thou mayest," and, of course, the latter must prevail.

The same constitutional weakness inheres in the provision of the borough code upon which also plaintiff relies, that the term of borough solicitor shall be four years, into which we must read the condition "if not removed", as was explicitly decided in *Ulrich v. Coaldale Boro.*, 53 Superior, 246, which governs the case at bar.

6. Accordingly judgment is given for the defendant.

T. D. Shea, F. M. Mackin, for plaintiff.

C. B. Lenahan, W. W. Hall, for defendant.

TRUSTEES, ETC., v. LEHIGH VALLEY COAL CO.

State hospitals—Claims for services to mine employes—Responsibility of employer—Compensation Act 1915—Priority of contract.

1. State Hospital Act does not prevent State hospital from looking to employer for services rendered injured coal mine employe, the prohibition in the Act being against charging injured miners for services.
2. Workmen's Compensation Act 1915 creates obligation not before existing to procure treatment for injured employes. Said Act also creates privity of contract, and common law creates obligation on employer to pay a *quantum meruit* up to the limitation fixed by compensation law.
3. Section 10 Act *supra*, not to be construed, in limiting the right to charge certain patients, to prohibit receiving payment for any except those patients.

Case stated. Common Pleas, Luzerne county. No. , 1918.

WOODWARD, J., October 31, 1918.—The facts and the question involved will be found in the case stated, as follows:

And now, May 27, 1918, it is hereby agreed by and between the parties to the above action that the following case be stated for the opinion of the Court, with the same force and effect as if the facts had been found by a jury in a special verdict:

1. The State Hospital of the Middle Coal Field of Pennsylvania was incorporated by Act of Assembly approved June 14, 1887, P. L. 399, copy of said Act being hereto attached and marked "Exhibit 1."

2. A supplement to said Act was approved May 1, 1907, P. L. 152, copy of which is hereto attached, made a part hereof, and marked "Exhibit 2."

3. Pursuant to said Acts the plaintiff operates and maintains a hospital at Hazleton, Pennsylvania.

4. The Lehigh Valley Coal Company is a corporation organized and existing under the laws of the State of Pennsylvania, engaged in the mining of anthracite coal, having its office and principal place of business at Wilkes-Barre, Pennsylvania.

5. Some of the mines operated by the defendant company are located at or near Hazleton, Pennsylvania, where the plaintiff hospital is located.

6. Section 306 (e) of the Workman's Compensation Law of June 2, 1915, P. L. 741, provides as follows:

"During the first fourteen days after disability begins the employer shall furnish reasonable surgical, medical and hospital ser-

vices, medicines and supplies, as and when needed, unless the employe refuses to allow them to be furnished by the employer. The cost of such services, medicine and supplies shall not exceed twenty-five dollars, unless a major surgical operation shall be necessary, in which case the cost shall not exceed seventy-five dollars. If the employer shall, upon application made to him, refuse to furnish such services, medicines and supplies, the employe may procure the same, and shall receive from the employer the reasonable cost thereof within the above limitations. If the employe shall refuse reasonable surgical, medical and hospital services, medicines and supplies, tendered to him by his employer, he shall forfeit all right to compensation for any injury or any increase in his incapacity shown to have resulted from such refusal."

7. The defendant company has been exempted by the Workmen's Compensation Bureau from insuring the whole or any part of its liability for compensation, in accordance with the provisions of Section 305 of the Workmen's Compensation Act of June 2, 1915, P. L. 741.

8. The persons whose names are set forth in the list hereto attached, made a part hereof and marked "Exhibit 3", were employes and workmen employed by the defendant between January 1, 1916, and September 1, 1917.

9. Neither the defendant nor any of the employes set forth in said list, Exhibit 3, elected to waive the provisions of the Workmen's Compensation Act of June 2, 1915, and the same was in full force and effect with respect to the defendant and all of said employes between the dates hereinbefore mentioned.

10. The employes of the defendant, aforesaid, in the course of their business and employment by the defendant, were injured on or about the days set forth in the statement, Exhibit 3, and by permission of the defendant were removed to the plaintiff hospital for treatment.

11. The plaintiff hospital treated the said employes for the length of time respectively set forth in the statement, Exhibit 3, and furnished or performed the services therein detailed.

12. The daily average cost of the services, etc., rendered such patients is set forth in said statement, Exhibit 3.

13. The respective charges made by the plaintiff as contained

in Exhibit 3, are reasonable and within the limitations prescribed in the Workmen's Compensation Act of 1915.

14. The plaintiff has made demand on the defendant for payment of the charges set forth in Exhibit 3, but the defendant has refused to pay the same, or any part thereof.

The plaintiff contends that by reason of the foregoing and the provisions of the Workmen's Compensation Act of 1915, the defendant is liable to the plaintiff for the respective sums set forth in said statement, Exhibit 3, aggregating \$1,166.68. The defendant denies said liability and avers that under the provisions of the law establishing the plaintiff hospital, the services hereinbefore referred to are required to be furnished by said hospital without charge or expense to the defendant.

If, under the foregoing facts, the Court be of the opinion that the defendant is liable to the plaintiff for the reasonable medical, surgical and hospital services rendered by the plaintiff hospital to the defendant's employes, as hereinbefore set forth, then judgment to be entered in favor of the plaintiff for \$1,166.68. But if the Court be of the opinion that the defendant is not so liable, then judgment to be entered in favor of the defendant. Costs to follow the judgment, and both parties reserve the right to appeal from the decision of the Court below to the Superior and Supreme Court.

FRANCIS SHUNK BROWN, Attorney General,
Attorney for Plaintiff,
F. W. WHEATON,
Attorney for Defendant.

EXHIBIT I.

No. 264.

AN ACT

To provide for the selection of a site and erection of a State Hospital for injured persons, to be located at or near Hazleton, in the county of Luzerne, to be called the State hospital for injured persons of the middle coal field, and for the management of the same, and making an appropriation therefor.

Section 9. That this hospital shall be specially devoted to the reception, care and treatment of persons injured in and about the mines, workshops and railroads, and all other laboring men; provided, however, that no patient shall be admitted for treatment in said hospital to the exclusion of the classes herein stated, and

who have not contracted injuries in or at the coal mines embraced within the territorial limits of the fourth inspection district of the anthracite coal fields of Pennsylvania.

Section 10. The trustees of said hospital may, from time to time, charge any patient other than the classes named in Section 9 of this Act, an amount sufficient to cover the cost of treatment.

We have only general principles of construction to guide us in a decision of this question.

The plaintiff hospital is a State institution, deriving its powers from the Act of the Legislature creating it.

One of the powers granted was to charge patients, other than persons injured in and about the mines, an amount sufficient to cover the cost of treatment.

This in negative form was a prohibition against charging injured miners for treatment.

The persons injured for whose treatment the charge was made and the bill rendered in this case were miners.

The charge is not made against them, but against their employer, the defendant.

If there were nothing else in the case the plaintiff could not collect. There would be no obligation on the defendant to pay. We must look elsewhere for an express or implied promise to pay. Section 306 (e) of the Workmen's Compensation Act, cited in paragraph 6 of the case stated, provides:

First: That the employer shall furnish reasonable surgical, medical, and hospital services, unless the employe refuses to allow them to be furnished by the employer.

Second. If the employer refuses to furnish them the employe may provide them and receive from the employer the reasonable cost thereof.

Third. If the employe shall refuse them when tendered by the employer, he shall forfeit the right to compensation.

If the employer, in the case stated, had sent the injured employe to the plaintiff's hospital for treatment, in compliance with the first mandate, then we should say that the employer must pay for the service, because the Compensation Act required him to pay and the State Hospital Act did not forbid the plaintiff to receive compensation except from employes.

If the employer had refused to furnish the required services

and the employe had chosen to go to the plaintiff's hospital for treatment, then we should say the defendant was not obliged to pay the plaintiff, for the Compensation Act stipulates in such case that the employer pay the employe the reasonable cost thereof to him, and as he has been at no cost there is nothing for the employer to pay. The case stated does not bring it clearly within either of these two classes. It says in paragraph 10 "that the employes were injured and by permission of the defendant were removed to the plaintiff hospital for treatment."

Does this bring the case under the first classification where the employer shall furnish services, or the second, where he refuses to furnish?

Permission is passive, while the Act contemplates some action by the defendant, either positive by furnishing or negative by refusing to furnish. Granting permission that the employe be removed to the plaintiff's hospital approximates the first class more closely than the second, and will be considered a compliance with the duty to furnish.

We then have a case of implied assumpsit on the part of the employer to pay, just as he would have to pay if the plaintiff's were trustees of an ordinary private hospital to which an employer had sent his employe or permitted him to be taken. The private hospital would look to the employer for reasonable pay for services rendered the employe. There is nothing in the State Hospital Act to prevent this. The prohibition is against charging the injured miners for services, not against charging their employers. The prohibition which is implied is found in Section 10 of the Act, as follows: "The trustees of said hospital may from time to time charge any patient, other than the classes named in Section 9 of this Act" (*i. e.* mine employes) "an amount sufficient to cover the cost of treatment."

Before the Compensation Act there was no obligation on the part of the employer to furnish treatment to the injured employe. So that if the employe went to the State hospital the contract for treatment was between the hospital and the employe, and the purpose of the Act was to relieve the injured employe from the burden of payment. Before the Workmen's Compensation Act, if the employer had sent his employe to the State hospital, there would have been nothing to prevent his becoming responsible for his treatment, if he so stipulated. The Compensation Act stipu-

lates for him that he will be responsible if he sends his employe there for treatment.

If, on the other hand, the employer had absolutely refused to furnish treatment, or had not been consulted, and the employe being a mine worker, had gone to the hospital on his own account the plaintiffs could not collect, because there would have been no privity of contract between the plaintiffs and the employer, but only between the plaintiffs and the employe whom they could not charge for services, and as the Compensation Act only requires the employer to reimburse the employe for what he has spent for services there would be nothing for the employer to pay.

The obligation to pay in this case does not arise from that part of the Compensation Act which specifically requires the defendant to pay something, because the payment referred to is made to the employe and not to the person or institution rendering the services; but it arises from the obligation to procure treatment which was not on the employer before, and when the treatment is furnished the law creates the obligation to pay. The Act creates the privity of contract which did not exist before, and the common law creates the obligation to pay a *quantum meruit* up to the limitation fixed by the Compensation Act. The State Hospital Act does not prohibit the receiving of compensation except from the injured mine worker. True, it gives the right to charge only patients other than mine workers, and it is agreed by defendant's counsel that having only the powers specifically granted in its charter the State Hospital in this case can make no charge to any one except patients other than mine workers, and that the defendant not having been a patient, is exempt. In other words, it is argued that the right to charge being limited to certain patients, it is equivalent to an express prohibition against receiving payment from any one except those patients.

We cannot so construe Section 10 of the Act. It is a plausible argument that the statute having specified whom the hospital may charge for services, it cannot charge any one else on the principle *expressio unius exclusio alterius*, but it is more plausible than reasonable, for it will hardly be argued if an employer of a laborer other than a mine worker had placed his employe in the plaintiff's hospital before the Compensation Act was passed and agreed to be responsible for his treatment, that the hospital would have violated its charter powers by accepting payment for him. If the Act had been silent about charges the hospital might have charged a reasonable compensation. The specific power given to charge any patient other than the classes named in Section 9 of this Act was simply an affirmative way of expressing the prohibition against charging mine workers.

Let judgment be entered in favor of the plaintiff for \$1,166.68.

F. S. Brown, for plaintiff.

F. W. Wheaton, for defendant.

JONES, TRUSTEE, *v.* SMITH *et al.*

Bankruptcy—Deed and mortgage to defraud creditors—Burden of proof.

Where A has given mortgage to his wife and deed to son and his estate afterward passes into bankruptcy and Court has decreed avoidance of mortgage and deed as against creditors,

Held, on exception by defendants:

That testimony of husband as to indebtedness to wife, uncontradicted, though unsupported, where means of supporting it are available, does not establish such indebtedness.

That where plaintiff trustee acting for creditors has established that deed was given to defraud creditors, and mortgage formed integral part of transaction, burden of proof otherwise rests upon the wife, and exception that plaintiff has not met two witness rule to avoid wife's mortgage, falls.

Exceptions to adjudication. Common Pleas, Luzerne county.
In Equity. No. 11, May term, 1917.

FULLER, P. J., October 10, 1918.—On the trial of this bill to avoid, as against the defrauded creditors of Adam Smith, his mortgage to his wife, his deed to his son, and the latter's mortgage to one Mosier, the Court found certain conclusions of fact and law leading to the decree *nisi*, "that as against creditors of Adam Smith, represented by the plaintiff as trustee of his estate in bankruptcy, the mortgage to his wife and the deed to his son be avoided, without prejudice, however, to the mortgage of Edith L. Mosier, whose recourse to the property is preserved as if this decree were not made".

Exceptions have been filed by plaintiff to the non-avoidance of the Mosier mortgage, which exceptions we dismiss without hesitation for the reasons stated in our decision.

Exceptions have also been filed by defendants to the avoidance of the wife's mortgage and the son's deed, mainly urging (1) as to the wife's mortgage, (a) that the evidence shows a *bona fide* indebtedness of husband to wife which could be lawfully secured against creditors without impeachment for fraud, and (b) at least the mortgage has not been overturned by two witnesses, or the equivalent; (2) as to the son's deed, (a) that his cognizance of the fraud was not proved, and (b) elimination of the wife's mortgage from the case defeats the bill in toto for want of jurisdiction, on the ground of adequate remedy at law by sheriff's sale and action of ejectment.

(1) (a) Concerning the indebtedness of husband to wife, it is claimed that the former's uncontradicted, though uncorroborated testimony, shows receipt by him of her money, which by

legal presumption established a loan and not a gift, subsisting and enforceable notwithstanding lapse of time and other infirmities, but the legal principle thus invoked only applies when the fact is found that the husband did receive the wife's money. In the present case we cannot find that fact from the uncorroborated and unpleasing testimony of the husband who conveyed his property in fraud of creditors.

That testimony, if true, was susceptible of easy corroboration, which has not been furnished.

In our adjudication we do not expressly state that it was untrue, nor expressly find the fact that the husband owed nothing to the wife by loan or otherwise, but such was the implication, and in order to avoid any misunderstanding, we now add to our former finding of fact, 6 (2), subject to exception, this:

"Adam Smith, at the time of giving the mortgage to his wife, had not received her money by loan or otherwise, and was not indebted to her in any amount."

(b) As against the contention that the plaintiff has not met the equity requirement of proof by two witnesses or the equivalent to avoid the wife's mortgage, his case is fortified by the legal burden of proof resting upon the wife in a contest with her husband's creditors. She has not sustained this burden. Therefore, when the plaintiff proved, as he did, by competent and sufficient proof, that the deed was given to defraud creditors, and that the mortgage formed an integral part of the same transaction, the burden shifted to the wife, and her failure to sustain the same makes out the case.

(2) (a) As against the contention that the son's cognizance of the father's fraud was not shown, and, therefore, the deed should stand, we refer to the recital of facts in our decision to vindicate our conclusion on that subject, and further discussion is unnecessary.

(b) As against the contention that the elimination of the wife's mortgage ousts the jurisdiction, we need only say that on our view of the transaction it is not eliminated; that if not eliminated, jurisdiction certainly attaches under *Orr v. Peters*, 197 Pa. 606, and similar cases; and that even if eliminated, leaving an adequate remedy at law as against the deed, the defendants cannot now question the jurisdiction on that ground, having failed to do so, *in limine*, by demurter or answer, as required by the Act of 1907.

The Court in banc affirms all findings by the trial judge, and accordingly all present exceptions are dismissed, reserving to defendants the right of filing within ten days after notice hereof, a specific exception to the new finding of fact above stated, before entry of final decree.

W. C. Price, P. L. Drum, for plaintiff.
G. J. Clark, for defendants.

Court of Quarter Sessions of Luzerne County.**COMMONWEALTH *v.* EDMONDS.**

Municipalities—Ordinances—Parking of taxicab—Summary Conviction.

1. While it would appear wise for a city to allow taxicabs reasonable parking privileges on the streets, still the city's right to regulate is not to be denied, and summary conviction for parking taxicab, against ordinance promulgated, will not be disturbed.
2. The Court cannot supervise municipal wisdom acting within the scope of its power.

Appeal from summary conviction. Court of Quarter Session. No. 324, April term, 1919.

FULLER, P. J., July 10, 1919.—The defendant was summarily convicted and found guilty by the mayor of Hazleton on charge of parking a taxicab, contrary to Section 65 of a general ordinance "regulating street traffic on public highways in the city of Hazleton, and providing penalties for the violation thereof"; which said section provides that "taxicabs and jitneys shall not be permitted to park upon any highway."

On trial of the appeal allowed from this conviction, the case was submitted entirely upon the transcript without other evidence, and the only question presented was the validity of the said section as a reasonable exercise of municipal authority.

It appears from the definitions contained in the general ordinance, as the parties agree, that "the word 'highway' shall mean the whole width from property line to property line of any street, lane, alley, avenue, boulevard, sidewalk, bridge, or other places intended, used, or set apart for the public, including sidewalks, curb, street, driveway and other intervening space therein"; and "the term 'parked' shall apply to a waiting vehicle and to waiting vehicles drawn up alongside of one another parallel or not parallel to the curb, except vehicles stopping to load or unload."

It was also assumed that a taxicab is a motor vehicle which runs upon the public highway for public hire, without fixed route or rail; the notion of a jitney, on the other hand, being coupled with a route more or less defined.

The city's right to regulate such vehicles in the use of the highways cannot be doubted any more than the right of the vehicles themselves can be doubted to use the highways subject to regulation. Nor can it be doubted that in such regulation the city may distinguish between vehicles for hire and other vehicles on the principle of classification.

It may prescribe the streets, the points upon the street, the

periods of time, and the manner in which parking may be allowed. The regulation, however, must of course be reasonable.

Quoting from the case of the Jitney Association *vs.* City of Wilkes-Barre, 256 Pa. 462, at page 468, "As to the right of the municipality to regulate in the interest of public safety the running of jitneys as well as all other traffic upon the public streets, we have no doubt, the only question in such a case is whether the requirements of an ordinance for the purpose are reasonable and not unduly burdensome. Regulation is not to be carried to the extent of prohibition. The fact that the owners of jitneys derive a profit from their operation makes no difference in their legal status."

The effect of the ordinance in question in light of the definitions above quoted, would be to allow the running of taxicabs from a terminus on private property, along the highways, serving passengers, and of course stopping for that purpose, but not standing in any public place to await or solicit patronage.

Such restriction might impinge upon the convenience of the traveling public as well as of the proprietor.

These handy vehicles might be handier to use and more used perhaps, if allowed to stand at convenient points along the highway.

It would seem to be far better regulation to provide parking privileges under reasonable restrictions as to time, place, and manner, and indeed we are extra-judicially informed in this case that such privileges are afforded to taxicabs, in another ordinance which is not before us.

But these considerations concern the wisdom rather than the power of the municipality, and the Court cannot supervise municipal wisdom acting within the scope of its power.

For aught we know, the city Solons in adopting this ordinance may have had in mind certain reasons which seemed to them sufficient, but we do not know and it is not our business to inquire what those reasons were.

From personal observation, however, we may say in passing, it is not difficult to believe that the parking of automobiles upon the streets may become as it often is, an intolerable nuisance.

Suffice it is to say, that in the absence of all proof upon the subject we are unable to conclude judicially that the requirement of this ordinance is unreasonable, unduly burdensome, or prohibitory in the sense of barring taxicabs from the highways altogether. So far as we can see the only burden imposed upon those lively vehicles is to keep moving, which instead of being burdensome might even bring a benefit, although it might increase the consumption of gasoline.

On the whole we conclude that the summary conviction should not be disturbed, and accordingly it is now affirmed.

Court of Common Pleas of Luzerne County.

RUTH v. LACKAWANNA AUTOMOBILE CO.

Judgment—Interpleader—Sale—Transfer of possession—Collateral attack on judgment secured from another county.

1. Where A issues execution on judgment secured in another county against B, and levies upon automobile, the same having been disposed of to C on bill of sale but no transfer of possession, and C sues A for recovery of property—
2. C's offer to show payment of judgment will be refused, lacking elements of collusion or fraud, and distinction between collusive or fraudulent judgment, and one that has been paid not recognized, on the ground that it would be collateral attack on a judgment recovered in a different county between parties other than those to the record of Luzerne county in case on trial.
3. Judgment n. o. v. for defendant.

Motion for judgment non obstante veredicto. Common Pleas, Luzerne county. No. 309, May term, 1916.

WOODWARD, J., March 31, 1917.—The defendant in this issue framed on a sheriff's interpleader presented a point for binding instructions at the trial which was refused, and on January 26, 1917, moved for judgment *non obstante veredicto* upon the whole record.

The defendant issued an execution from Lackawanna county and levied upon an automobile which was in the possession of Wilbur E. Ruth, the defendant in the execution, whereupon the plaintiff in this issue, Wallace M. Ruth, claimed title to the automobile and the sheriff asked for an interpleader. Wilbur E. Ruth purchased the automobile from the defendant for \$300 on November 9, 1915, and paid \$120 on the purchase price. To pay the balance he borrowed \$180 from his cousin, Wallace M. Ruth, the plaintiff in this issue, and gave him a bill of sale of the automobile as security for the loan. Wallace M. Ruth at the same time executed a lease or bailment for the machine to Wilbur E. Ruth, by which Wilbur was to pay a certain amount of rental each month until the \$180 had been repaid, and then was to have a conveyance back to him of the machine for the further consideration of one dollar. There was no change of possession. Wilbur E. Ruth continued to use the machine as a jitney until it was levied upon by the sheriff on the execution issued by the Lacka-

wanna Automobile Co. Nor did he ever make any payments on the lease.

On the trial there was no dispute about these facts. Wallace M. Ruth told frankly how his cousin had come to him to borrow the balance of the purchase money for the machine, and when asked for security replied that the only security he could give was the automobile itself. Whereupon Wallace M. Ruth gave him the money and took the bill of sale as security for the loan. There was no fraud in fact in the transaction, but defendant claims that it was a fraud in law because there was no change of possession whatever.

On the trial we allowed the case to go to the jury, as it seemed a hardship under the circumstances in the absence of any actual fraud and in view of the fact that the Lackawanna Automobile Co. had got the benefit of the loan of \$180 on the purchase price of the automobile. We are convinced that this was error under the decisions in this State, which uniformly hold that where there is no change of possession in the sale of personal property which is capable of such a change, the sale is void as to creditors of the vendor. The cases which were cited as apparently exceptions to the rule are cases where the question has been left to the jury to determine whether there was not such a change of possession as the nature of the property and the circumstances of the parties made possible, such as household furniture or personal property on a farm, where the vendor and vendee are both living on the premises. With these exceptions the rule has been strictly adhered to as originally laid down in *Clow v. Woods*, 5 S. & R. 275, and well expressed in the sylabus of *Hill v. Leibig Mfg. Co.*, 3 Superior, 398, as follows:

"Good faith, honesty of purpose; a valid and adequate consideration; an absolute unconditional sale; actual, visible, manual delivery, or, in its absence, such change of possession as the character of the property and the nature of the transaction, the position of the parties and the intended sale of the property admit of; continuous possession by vendee—these are the essential prerequisites which must enter into and proceed from the transaction to make a sale of personal property valid as against creditors in Pennsylvania."

On the trial the plaintiff, Wallace M. Ruth, offered to prove

that the judgment against Wilbur E. Ruth in favor of the Lackawanna Automobile Co. in Lackawanna county, on which the execution issued, had been paid. The offer was refused because there was no claim of collusion between the Lackawanna Automobile Co. and Wilbur E. Ruth, who might have made the defense of "payment" in Lackawanna county, or might have had the judgment opened or set aside on that ground after it was entered. It is analogous to the cases which uniformly hold that a judgment cannot be attacked collaterally except for collusion or fraud. In Thompson's Appeal, 57 Pa. 178; Judge Strong said:

"Judgment creditors may attack a judgment collaterally when it is a fraud upon them, as when there has been collusion between the debtor and the creditor; but they cannot set it aside merely because it is a fraud upon the debtor. This was clearly shown in Dougherty's Estate, 9 W. & S. 189. Like the present case, that was a distribution of the proceeds of the sheriff's sale of real estate. Judgment creditors objected to a prior judgment that it was fraudulent, and given without consideration, and they demanded an issue to try whether such were not the facts. The Court below refused it, and on appeal to this Court it was held that the refusal was right, because no collusion was alleged. Without collusion, the facts asserted, even if established, could have availed nothing to the junior creditors. Chief Justice Gibson, in delivering the judgment of the Court, remarked that the application of the creditors to vacate the older judgment was founded on no principle whatever. Where a collusive judgment comes into collision with the interests of creditors, they may avoid the effect of it by showing it to be a nullity as to themselves; and in doing so they do not impair its obligation between the original parties, upon whom it is undoubtedly binding; a fraudulent judgment, like a fraudulent deed, being good against all but the interests intended to be defrauded by it. But they cannot call upon the Court to vacate it on the record, which would annul it as to the whole world. It is contended, however, that the judgment is fraudulent, because he who confessed it was defrauded. A surreptitious judgment, however, is fraudulent only as to the immediate parties to it, by the 13th Eliz., against creditors, who certainly cannot go behind it to try over again a defense which their debtor had made, or was competent to make."

It is to be observed that no collusion between Wilbur E. Ruth and the Lackawanna Automobile Co. is asserted. If we had allowed the plaintiff's offer to show that the judgment in Lackawanna county was paid, we would have gone behind the judgment to try over again a defense which the debtor, Wilbur E. Ruth, had made or was competent to make in Lackawanna county. The offer disclosed the fact that the defense was not payment in cash, or a payment after the judgment had been entered and a failure to enter the satisfaction on the record, but that the judgment was on a confession in a judgment note given for a previous purchase of an automobile truck by Wilbur E. Ruth from the Lackawanna Company for \$1,000 in February, 1914, and that the defense was that after making some payments on the truck Wilbur E. Ruth, finding that he was unable to complete the payments, made an agreement with the Lackawanna Automobile Co. by which he was to put the truck in good order and return it to them; whereupon they were to cancel his indebtedness and take the truck back, and that this agreement had been carried out. This was denied by the Lackawanna Automobile Co., and if we had allowed the offer we would have entered into the trial of that issue, which should have been tried on an issue between Wilbur E. Ruth and the Lackawanna Automobile Co. in Lackawanna county.

Plaintiff urged a distinction between the case of a collusive or fraudulent judgment and a judgment which had been paid, but we can see no such distinction, for, if the offer had been allowed it would have been a collateral attack upon a judgment in a different county, between parties other than those to the record of the case on trial. In this we think there was no error.

Motion for judgment in favor of the defendant *non obstante veredicto* allowed.

SUMMARY OF OPINION.

In *Smith v. Smith*, No. 1313, October term, 1917, Common Pleas, Luzerne county, President Judge Fuller, on rule to strike off appeal from justice of the peace, decided:

Conceding local Luzerne county Act 1870. P. L. 269, to be still operative, plaintiff's right to avail himself thereof is doubtful where record does not show labor to have been performed in Luzerne county. But where defendant in good faith and under direction of justice of peace makes the ordinary affidavit and gives recognizance, it is proper to allow appeal to be perfected. See *Kearney v. Martin*, 14 Luzerne, 286.

KRAATZ, ADMX., v. SUPREME LODGE, K. OF P.

Beneficial Societies—Change of occupation of insured—Forfeiture—Increased premiums—Notice—Waiver.

1. Where one insured in beneficial society changes his occupation to one prohibited by the laws of the society, paying a raised premium, the question of whether several premium payments at increased rate was sufficient notice to put the Supreme Lodge on inquiry regarding change of occupation, is for the jury, and summary judgment for plaintiff will be refused.
2. Above also involves for jury question whether increased premium paid for a period is a waiver of laws of society making change of occupation without notice a forfeiture of membership *ipso facto*, and whether continued receipt of larger premium estopped defendant from setting up such defense, and particularly reasonableness of delay of Supreme Lodge in declaring forfeiture of the policy.

Rule for judgment. Common Pleas, Luzerne county. No. 365, October term, 1918.

WOODWARD, J., August 15, 1919.—On March 22, 1919, we filed an opinion in this case making absolute the rule for judgment for want of a sufficient affidavit of defense.

On April 3, 1919, this decision was recalled and the defendant given ten days to file a supplemental affidavit.

On June 17, 1919, after supplemental affidavit had been filed, we discharged the rule for judgment, holding that the supplemental affidavit was sufficient, and handed down an opinion which was filed on June 20, 1919.

In this opinion we held the supplemental affidavit sufficient because it alleged what had been omitted from the original affidavit, to-wit: "That Kraatz, who held the certificate of insurance in the defendant society in 1913 changed his occupation from 'bartender in brewery for help only' to 'agent', and thereby received a reduction in his monthly payments from \$2.60 to \$2.20 per month; that on January 1, 1918, he abandoned his occupation as agent and engaged in the prohibited occupation of bartender, without notice to and without the knowledge of the defendant, and without change in his reduced premiums."

After filing this opinion our attention was called by the attorney for the plaintiff to the fact that we erred in stating that when he abandoned his occupation as agent and engaged in the prohibited occupation of bartender, it was "without change in his reduced premiums"; that there had been a change in his premiums from \$2.20 a month, which he had been paying, to \$2.60, which he con-

tinued to pay from January 1 to and including May, 1918, and that this fact was admitted in the supplemental affidavit of defense.

When our attention was called to this mistatement of fact we called the counsel before us for a re-argument of the whole case, and after reconsidering, we see no reason for changing our decision discharging the rule for judgment.

As the case has become somewhat involved by reason of the voluminous pleadings and the numerous decisions, we will restate the facts:

Kraatz took out his original certificate of membership in the insurance department of the defendant society, making his wife the beneficiary therein, in July, 1894, giving his occupation for membership as hotel waiter.

In February, 1908, Kraatz made application for a transfer from the fourth to the fifth class of the insurance department on account of a change in his occupation from hotel waiter to "tending private bar in brewery for help only," and this application for change from the fourth to the fifth class was allowed.

In September, 1913, Kraatz gave the defendant society notice of another change of occupation to that of agent, and his monthly payments were reduced from \$2.60 to \$2.20 accordingly. He continued in this occupation as agent from 1913 to January, 1918, on the payment of \$2.20 a month assessment. The supplemental affidavit of defense then sets out the ground of defense in section (g) of the third paragraph as follows: "That on January 1, 1918, said Kraatz abandoned the occupation of said agent and engaged in the occupation known as bartender, an occupation prohibited by the said laws and classification of occupation of said defendant society, attached to this affidavit, and marked Exhibit B and Exhibit C, and made part hereof.

h. That upon said Kraatz engaging in said occupation of said bartender, he, said Kraatz, then and there, *ipso facto*, ceased to be a member in good standing in said defendant society."

Section d, of paragraph 7, of the affidavit, is as follows:

"d. That said Kraatz, on January 1, 1918, without notice, then; nor within thirty days thereafter, to said defendant society, and without the knowledge and consent of said defendant society, and without any sum, as monthly assessment being fixed; changed

his, said Kraatz's occupation from that of agent, an occupation permissible to members of said defendant society, by the laws, rules and regulations of said defendant society; to that of bartender, an occupation prohibited to members of said defendant society, by the laws, rules and regulations of said defendant society; and working a forfeiture of any, every and all rights in and to any, every and all benefits of, and moneys paid to said defendant society; according to the laws of said defendant society; said laws being attached to this affidavit, marked exhibit B and Exhibit C, and made part hereof.

"e. That under the said laws, rules and regulations of said defendant society, the said several sums of money purporting to be assessments, but each and every one of said payments and sums being in excess thereof) paid by said Kraatz to the defendant's local representative, on or after said January 1, 1918, and after said change of occupation from said agent, to said prohibited occupation of bartender; without notice to, and without the knowledge and consent of said defendant society, was a fraud, and an attempt on the part of said Kraatz to defraud the said defendant society, into a continuation of said Kraatz's membership; and permission to said Kraatz to participate in and enjoy the benefits of said defendant society; and into a continuation of any, every and all rights, of said Kraatz, as a member of said defendant society, after the said Kraatz had engaged in the occupation of bartender, an occupation prohibited by said laws of said defendant society, to members thereof, and not paid assessments or premiums but sums in excess thereof for the purpose of perpetrating said fraud upon said defendant society.

"This, notwithstanding, said several sums (in excess of the heretofore regular, agreed upon and fixed) paid by said Kraatz after January 1, 1918, for future application, when he would explain a contemplated change of occupation.

"f. That said defendant society, after said change of occupation on the part of said Kraatz, from that of agent to that of bartender, on January 1, 1918, did thereafter refuse to receive from said Kraatz, any dues and assessments; and by its board of control, did, in accordance with the laws, rules and regulations of said defendant society, annul said certificate No. 236661 of said Kraatz, and immediately thereafter tendered back to said Frantz, said several sums, in excess of the heretofore regular assessment paid by him, said Kraatz, to said local representative of said

defendant society after January 1, 1918, and which were by said Kraatz refused."

The laws governing the insurance department of the defendant society, attached to the supplemental affidavit of defense marked exhibit B, provide, *inter alia*, on page 48, under the title "Waiver of Supreme Lodge Law not Allowed", S. S. (Supreme Statute) 530: "The receipt and retention of payments and assessments from members by the insurance department shall not constitute a waiver of any law of the Supreme Lodge, or defense which might be relied on had such payments not been received and retained. No course of dealing between members and officers, whether persisted in for a long or short time, shall waive this provision, or the effect of same; all of said laws enacted by the Supreme Lodge, having been enacted by it in its representative and legislative capacity only, in which every member is a party, are intended to bind all members at all times."

It is argued by counsel for the defendant that when Kraatz changed his occupation in January, 1918, from agent to bartender, the latter being prohibited under the by-laws of the society, he thereby *ipso facto* ceased to be a member of the society, and that under the by-laws last cited the receipt by the agent in Wilkes-Barre of \$2.60 instead of \$2.20, which he had been paying, was not a waiver by the defendant company of this forfeiture.

We are in some doubt about the sufficiency of this defense, and for that reason refuse to give judgment for want of its sufficiency, and prefer to allow the case to go to trial in order that a jury may decide whether the receipt by the defendant society after January 1, when he changed his occupation to a prohibited one, of \$2.60 premium instead of \$2.20, and its continued receipt of the larger amount for the months of January, February, April and May (there being no assessment in the month of March), was such notice to the Supreme Lodge that Kraatz had changed his occupation as to put them on inquiry as to the nature of his new occupation. Whether the continued receipt by the insurance department of this increased premium for so long a time was a waiver of the law of the society making a change of occupation without notice a forfeiture of membership *ipso facto*, in view of the Supreme Statute No. 530 cited above; and whether the continued receipt of the larger premium for so long a time estopped the defendant from setting up such a defense, may be questions for the Court, irrespective of any finding of the jury, but it seems to us now that the reasonableness and unreasonableness of such a delay in declaring a forfeiture is a question for the jury, and that judgment should not be awarded summarily on this rule.

Our former ruling discharging the rule is not changed.

H. B. Hamlin, for plaintiff.

T. F. Gwilliam, for defendant.

KULICK *et al.* v. MORRETT *et al.*

Evidence—Judgment note—Rule to open judgment—Consideration—Power of attorney.

Where, in suit on judgment note and rule to open, defense is offered that note was given, A to B, as collateral security, A having undertaken, with power of attorney, management of B's estate while B was in war duty, and that A never took possession of the estate, and where B's witnesses testify to a draft against A having been paid in two cashier's checks, one endorsed by B, and that on same day B's account at the bank had been charged with exact amount of the other check, the two checks totaling amount of the draft, presumption is strong that judgment note *supra* was given for valuable consideration, and rule to open judgment will be denied.

Rule to open judgment. Common Pleas Luzerne county. No. 581, July term, 1919.

WOODWARD, J., October 14, 1919.—This is a rule to open a judgment entered by confession in a judgment note signed by the defendants for \$2,400, dated May 24, 1918, payable one year after date to the order of Charles Kmicic. The note was filed in the prothonotary's office on June 19, 1918, by the plaintiffs as executors of the payee, who died June 7, 1918. Execution issued but was stayed by the rule now under consideration. It is agreed by counsel that the judgment against Viola Morrett may be stricken off.

In the defendant's petition to open the judgment the reason for the prayer is that the judgment note in question did not represent any indebtedness from the defendant to Charles Kmicic, but was given as security for the faithful performance of the trust committed to John Morrett, one of the defendants, by Charles Kmicic, who was about to go to the war and had turned over all his property to John Morrett and appointed him his attorney in fact to manage and dispose of same in Kmicic's absence, and a copy of the power of attorney is attached to and made a part of the petition.

The averments of the petition are all denied by the plaintiffs' answer, except the execution of the note, which they claim was given for a bona fide indebtedness of John Morrett to Charles Kmicic. The note is regular upon its face, bears the seals of the

makers after their signatures, thus importing consideration, and does not state that it is given as collateral security. The burden, therefore, was upon the petitioners to establish by satisfactory evidence that the note was given as security for the faithful performance of the trust, and that as the defendant never took possession of the property under the power of attorney he owed nothing on the note.

Depositions were taken pro and con, and the mouth of the defendant, John Morratt, being closed by the death of Kmicic, witnesses were called who testified that they had heard Kmicic say before his departure for the war that he had handed his business over to Morrett and had taken a note as collateral security for the faithful performance by Morrett of his duties as trustee. They said that the value of Kmicic's property, which he has proposing to turn over to Morrett was ten thousand dollars and could not explain why security should be taken in the sum of \$2,400. The petitioners also called for the bank book of Kmicic, which showed no checks drawn against his account at that time corresponding to any loan of \$2,400. In behalf of Kmicic it was shown by Charles L. Robbins, who was attorney for the estate of Charles Kmicic, that he found in his safe deposit box, after his death, a will which mentioned the \$2,400 note of Morrett as one of the assets of his estate, and also a list of the contents of the box, including this same note. It was argued that these were self-serving declarations, but as they were called out by the defendants' counsel on the cross examination of Mr. Robbins they are entitled to consideration.

The most persuasive evidence, however, that the note was for a bona fide indebtedness is the testimony of W. J. Ruff, cashier of the Luzerne County National Bank, who testified that a draft was drawn on the defendant, Morrett, by Edward Lewith, which was received at the bank on January 2, 1918, and paid on January 14, 1918, by two checks, one a cashier's check on the Second National Bank, dated January 14, 1918, to the order of Charles Kmicic for \$1,283.62, and the other a cashier's check dated January 14, 1918, payable to Stanislaw Michalski, endorsed by him and by Charles Kmicic, for \$1,000; the two checks making the exact amount of the draft, to-wit, \$2,283.63, within one cent.

The savings account book of Charles Kmicic shows a with-

drawal on the same date, January 14, 1918, of \$1,283.62, the exact amount of the cashier's check of that date which was applied on the draft, and as the other check paying the balance of the draft was endorsed by Charles Kmicic as the last endorser the presumption is strong that this draft on Morrett was paid by Kmicic and that the judgment note in suit, given by Morrett to Kmicic on May 24, 1918, was in consideration of this indebtedness of Morrett to Kmicic.

We find from the evidence in the case that the judgment note was given for a valuable consideration, to-wit, the existing indebtedness of Morrett to Kmicic, and not as collateral security. The rule to open the judgment is therefore dismissed.

C. L. Robbins, for plaintiffs.

B. R. Jones, for defendants.

CONNELL *v.* CASTERLINE *et al.*

Ejectment—Abstract of titles—Details—Amendment.

Where plaintiff's abstract of title in ejectment proceedings is complete in general, but lacks specific detail as to certain deeds—as "deed A to B, and seemingly not recorded" not setting forth that there is any such deed or where located at the time, and another lacking detail that certain property was "sold by the sheriff as the property of A", as inspection of sheriff's deed would have revealed, leave will be given to amend the abstract.

Common Pleas, Luzerne county. No. 214, July term, 1919.

WOODWARD, J., September 11, 1919.—Plaintiff in the above action of ejectment filed her declaration with an abstract of her title under which she claims the land in dispute under the provisions of the Act of 1915, P. L. 887, and notified the defendants to file their answer, abstract of title, and general plea within thirty days as required by our court rule in such case made and provided; whereupon the defendants obtained this rule to show cause why the plaintiff's declaration and abstract of title should not be declared of no legal force and validity and insufficient to require from defendants a plea, answer or counter-abstract, and why said declaration and abstract of title and proceedings should not be quashed and stricken from the record.

We will not quash or strike from the record the plaintiff's declaration and abstract of title, but an inspection of the abstract shows that it is defective in certain matters, and we will allow the plaintiff to file an amended abstract of title correcting these defects, if possible, and proceed anew with his notice under the court rule.

We find no material defect in the abstract down to the following item: "Deed, Isaac Thompson to E. G. Thompson, and seemingly not recorded." This is rather meagre and the plaintiff should set forth her ground for stating that there was any such deed and where it is at present, if possible.

The following item: "Deed, Jasper B. Stark, sheriff, to Crandell W. Thompson, for the premises in question, dated July 13, 1857, recorded in the prothonotary's office, said county, in sheriff's Deed Book 14, page 433," should set forth what an inspection of the sheriff's deed reveals, that it was sold by the sheriff as the property of E. G. Thompson and another. This would serve in some measure to establish the unrecorded deed from Isaac Thompson to E. G. Thompson in the immediately preceding item.

In the last two items of the abstract, the deeds from grantors to Mary Frances Connell, the plaintiff, dated respectively December 27 and September 15, 1916, giving the book and page of the recording of the deeds should also set forth that they convey the land described in the writ.

When these amendments are made, and assuming, as we must assume for the present, that the statements made in the abstract of title are true, it seems to form a connected chain of title from the Commonwealth into the plaintiff, and to be sufficient to require a counter-abstract on the part of defendants.

The plaintiff is therefore given ten days from notice of the filing of this opinion to file an amended abstract in compliance with these suggestions, or on failure to do so the rule to show cause why the declaration and abstract of title should not be declared of no legal force and validity and insufficient to require from defendants a plea, answer or counter-abstract will be made absolute and judgment entered for the defendants on the pleadings.

W. L. Pace, for plaintiff.

J. F. Cohan, for defendant.

WATKINS *v.* WATKINS.

Husband and wife—Alimony—Maintenance and support—Orders concurrent—Jurisdiction—Increased allowance—Equity—Levy on property.

1. Where original allowance for wife's maintenance and support was not made under Act 1867, but in the Common Pleas, the Acts of 1907, 1909 and 1913, being remedial, and enlarging the remedies of married women, may be construed in *pari materia* with Act 1867. Under these later Acts, by proceedings in equity, a case can be brought to appellate courts for review.
2. And where a wife is clearly entitled, owing to her physical condition and ability of husband to pay, to increased allowance over that at first awarded for maintenance and support, it will be decreed, even though the remedy be invoked of seizure and sale of property in the jurisdiction, belonging to husband out of the jurisdiction.

Common Pleas, Luzerne county. Sitting in Equity. No. 1, May term, 1916.

O'BOYLE, J., September , 1919.—This case comes before us by a bill in equity filed under the Act of May 23, 1907, P. L. 227, as amended by the Act of 1909, P. L. 182, as amended by the Act of 1913, P. L. 867, in which we are asked, in substance, to increase the allowance of alimony which the Court had awarded to the plaintiff when she instituted divorce proceedings in 1903.

The Act of 1907, the first Act relating to and enlarging the rights and remedies of married women, in cases of desertion or non-support by husbands, is as follows:

"Section 1. If any man shall separate himself from his wife without reasonable cause * * * and shall neglect or refuse to provide suitable maintenance, that the wife is empowered to bring her action at law or in equity against him for maintenance.

"Section 2. Whenever the husband shall absent himself from the Commonwealth, the proceedings may be had against his property, real or personal, necessary for the suitable maintenance of the wife, and the Court may direct a seizure or sale or mortgage of sufficient of his estate as will provide the necessary funds for such maintenance."

The Act of 1909, P. L. 182, amended Section 1, making the husband and wife fully competent witnesses, reads as follows:

"Section 1. That if any man shall separate himself from his wife without reasonable cause, and being of sufficient ability, shall neglect or refuse to provide suitable maintenance for his said wife, such wife shall be and is hereby empowered to bring her action, at law or in equity, against such husband for maintenance, in the

Court of Common Pleas of the county where the desertion occurred, or where she is domiciled; and the said court shall have power to entertain a bill in equity in such action, and shall make and enforce such orders and decrees as the equities of the case demand; and in such action, at law or in equity, the husband and wife shall be fully competent witnesses.

"Section 2. Whenever such husband shall absent himself from this Commonwealth, proceedings may be had legally against any property, real or personal, of said husband, necessary for the suitable maintenance of the said wife; and the Court may direct a seizure and sale, or mortgage, of sufficient of such estate as will provide the necessary funds for such maintenance, and service upon the defendant shall be made wherever he may be found, in the manner provided in the Act of General Assembly, entitled "An Act to authorize the execution of process in certain cases in equity concerning property within the jurisdiction of the court and on the defendants not resident or found therein."

The Act of 1913, which is the latest Act relating to this subject-matter, and upon which the plaintiff in this bill relies for her remedy, is, in part, as follows:

"Section 2. Whenever any man has heretofore separated, or hereafter shall separate himself from his wife, without reasonable cause, or whose whereabouts are unknown, and being of sufficient ability, has neglected or refused or shall neglect or refuse to provide suitable maintenance for his said wife, proceedings may be had against any property, real or personal, of said husband, necessary for the suitable maintenance of the said wife; and the Court may direct a seizure and sale, or mortgage, of sufficient of such estate as will provide the necessary funds for such maintenance; and service upon the defendant shall be made in the manner provided in the Act of General Assembly" * * *

It will be observed, that in the Act just above referred to, in Section 2 thereof, it provides, that:

"Whenever any man has heretofore separated, or hereafter shall separate himself from his wife, without reasonable cause, or whose whereabouts are unknown, and being of sufficient ability, has neglected or refused to provide suitable maintenance for his said wife, proceedings may be had against any property, real or personal, of said husband, necessary for the suitable maintenance of the said wife," etc.

The Acts from which we have above quoted, were construed in *Riebrich v. Riebrich*, 23 District Reports, 1001, as having been passed for the purpose of giving wives whose husbands had deserted them, or refused to provide for them, a civil remedy in addition to the criminal or quasi criminal remedy existing under the Act of April 13, 1867, P. L. 78, and other similar Acts.

The Act of 1867 is the Act under which husbands are prosecuted for refusing and neglecting to support their wives, and is instituted by arrest and prosecution in the Court of Quarter Sessions. The Courts have held that the Act of 1907, as amended by the Acts of 1909 and 1913, are in *pari materia* with the Act of 1867.

This construction is in conformity, no doubt, with the intention of the Legislature to enlarge the remedies of married women, by compelling husbands who have the ability, but fail, to support their wives, but who could not be reached under the Act of 1867.

In the case before us, Mrs. Watkins contends that she comes within the letter and spirit of Section 2 of the Act of 1913, P. L. 867, wherein she states, that Watkins, her husband, heretofore, about fifteen years ago, separated himself without reasonable cause, from her, and that his whereabouts were unknown, excepting insofar as to know that he was somewhere in California, and was of sufficient ability, from her knowledge of his property, to provide for her.

Counsel for the defendant has very earnestly contended that we are without jurisdiction, because in the divorce proceedings instituted in this court in 1903, to No. 645½ May term, by the plaintiff, the Court granted to libellant, Anna Watkins, counsel fees, and allowed her the sum of twenty-five dollars as alimony during the pendency of the case.

This order was made about fourteen years ago, and the defendant has been out of the State, and absent from this Commonwealth now for more than ten years.

At the time this order was made, Mrs. Watkins' remedy was either in the Quarter Sessions, under the Act of 1867, or by petition asking the court for alimony, or she could have both remedies at one and the same time, as was held in *Heilbron v. Heilbron*, 158 Pa., page 297, wherein it was stated:

"The existence of an order of the Quarter Sessions requiring a husband to pay six dollars a week for the support of his wife, did

not prevent the Court of Common Pleas from decreeing alimony *pendente lite*.

"On the contrary, the superior or rather the more general jurisdiction on this subject is in the divorce court.

"It may decree such sum as the circumstances call for, to be commensurate with the position and financial ability of the parties."

This is still the law of our State, and is authority for the proposition that both orders, one in the Common Pleas in the divorce proceedings, the other in the Quarter Sessions, under the Act of 1867, may run concurrently during the pendency of the proceedings.

In our own court, in the case of Nogic *v.* Nogic, 25 County Court reports, page 397, Honorable Judge Lynch held:

"The existence of an order of the Court of Quarter Sessions in a desertion case requiring plaintiff to pay twenty dollars a month for the support of his wife, does not prevent the Court of Common Pleas from decreeing alimony *pendente lite* and counsel fees."

In this case, while originally the proceedings were not instituted under the Act of 1867, but in the Common Pleas, still the Acts of 1907, 1909 and 1913, being remedial statutes, enlarging the remedies of married women, may be construed in *pari materia* with the Act of 1867, and therefore, upon principle, the above case would be an authority that a proceeding under any of these Acts could run concurrently with a decree pending divorce proceedings.

These Acts to which we have just referred, were not in existence when the order of Court, in 1903, was made, so that the only remedy Mrs. Watkins had in order to obtain support, was to make an application to the court for alimony, after having instituted divorce proceedings.

Alimony pending divorce proceedings *a mensa et thoro*, is granted under the common law, as a matter of justice, where the Court is satisfied that a proper allowance should be made to the wife, if she be not herself of sufficient ability to enable her to maintain or defend the suit, having regard to the ability of her husband.

It is entirely within the discretion of the Court as to the amount and duration, and not subject to review.

This principle of law was laid down in Naylor *v.* Naylor, 59 Superior Court, 547, so that it is well settled that prior to the Act

of 1907, as amended by the Acts of 1909 and 1913, the wife could not have any proceeding against her husband for support reviewed, but under these Acts, by proceedings in equity, the case can be brought to the appellate courts like any other proceeding, and be there reviewed.

These Acts are remedial, and, as we take it, should be construed liberally, as they were intended to supply the deficiency of the Act of 1867, and also the law as it existed in 1903, when application was made for alimony in the original case.

In the case at bar, had Mrs. Watkins made an application to increase her allowance in the divorce proceedings, the defendant, being a non-resident of the State, no service could be had upon him, and the Court would be without jurisdiction to hear and determine the case, and increase the allowance. A service upon the attorneys of record would not be sufficient service to give the Court jurisdiction to decree an extra allowance. An arrest, under the Act of 1867, was impossible, owing to the defendant being out of the jurisdiction of the court.

Therefore, the only remedy, in order to reach his property, when he is a non-resident of the State, is by proceedings in equity, against his estate, either real or personal, in order to derive therefrom suitable maintenance for his wife.

We have seen, as before referred to, in *Riebrich v. Riebrich*, 23 District Rep. 1001, that the Court held that the Acts of 1907 and 1913, had no application, unless the husband has absented himself, and his whereabouts are unknown. The proceedings in the case referred to were a bill in equity under these Acts, and the Court, while dismissing the bill, for the reason that the husband did not absent himself, still made an order directing the husband to support his wife, as he was a resident of the State.

There is no question whatever about the defendant's ability to maintain and support his wife. We were of opinion when the case was originally heard before us, that the Court had jurisdiction in equity, under the Acts referred to, and that the order for alimony in the proceedings for divorce instituted in 1903, does not make the merits of the case *res adjudicata*. We feel satisfied that the plaintiff still has a right, under changed conditions—high cost of living, illness, age, and other infirmities—to come into court by bill in equity, and ask that she be given, from her husband's estate, a suitable allowance, to provide, at least, for her necessities.

DISCUSSION.

It appears from the testimony in the case, that this couple were married March 29, 1873, and resided together in the borough of Plymouth, until the year 1902.

On the 29th of April, 1903, proceedings in divorce, *a mensa et thoro* were instituted, to No. 645½ May term, 1903.

The evidence in the original case, and in the case at bar, discloses the fact that the desertion occurred in 1902, and that since 1903 the defendant has absented himself from the home of his wife, and took up his residence for a time, at a place called Lehman, in this county, and that at a later period, about ten years ago, he removed from this State to the State of California. He, however, has continued to pay his wife the sum originally decreed.

This bill was filed April 24, 1916, under the Acts hereinbefore referred to, for the purpose of requiring the defendant to pay a larger amount for the support and maintenance of his wife, for the reason that under the changed conditions, and the health of the plaintiff, the allowance decreed in 1903 is insufficient to procure for her medical attendance, such as she requires, nor is the amount sufficient to enable her to procure the actual necessities of life, aside from her medical attendance.

The parties in interest all appeared before us on September 5, 1916, and gave their testimony for and against an increase of allowance to the wife. We were then greatly impressed with the appearance and enfeebled condition of the plaintiff. Her sight was very much impaired, and she is suffering from other physical ills, which require medical attention; and testimony was offered showing that she needed the services frequently of a nurse, and was unable to earn anything for her own support.

The atmosphere of the case, the contrast in the vigor and appearance of the contending parties, was so great, as to impress upon us the fact that she was too infirm to help herself, and that the sum which she is receiving is entirely inadequate to provide her with even the necessities of life.

The testimony taken at the hearing clearly established that the defendant was possessed of a considerable estate, from which he derived at least one hundred and forty dollars a month here, and that he had other interests in California, where he resided, and was able to earn, under his own admission, from seventy-five to one hundred dollars a month.

Under these circumstances, it would be unjust, inequitable and inhuman, without,—so far as the record discloses—any other burdens on the part of the defendant, or family to maintain, to hold that twenty-five dollars a month was adequate for the maintenance of his wife, and permit her to starve, while he enjoys the comforts and luxuries of life.

LAW.

We have been asked by counsel for the plaintiff to find the following findings of law:

"First. That the court has jurisdiction of the bill filed in this case, under the Act of 23rd of May, 1907, P. L. 27, as amended

by the Act of 27th of April, 1909, P. L. 182, as amended by the Act of 1913, P. L. 867".

This request is affirmed.

"Second. That the plaintiff is entitled to the relief prayed for in her bill, and entitled to an order for an allowance, and directing the defendant, William D. Watkins, her husband, to pay a sufficient amount for her suitable maintenance and support".

This request is affirmed.

"Third. That a decree be ordered, directing a seizure and sale, or mortgage, of sufficient of the estate of William D. Watkins, as described in the bill, as will provide the necessary funds for the suitable maintenance and support of his wife, Ann Watkins."

This request is affirmed, with the suggestion that the decree, when finally drawn, shall provide a means, without the necessity of seizure and sale of the defendant's property, to protect the interest of the plaintiff.

LAW.

We have been asked by counsel for defendant to find the following findings of law:

"First. The Act of 23rd of May, 1907, P. L. 227, as amended by the Act of 27th April, 1909, P. L. 182, is repealed by the Act of 27th March, 1913, P. L. 14."

This request is refused.

"Second. The Acts of May 23rd, 1907, and 27th April, 1909, being repealed, the Act of 21st July, 1913, P. L. 867, entitled "An Act to amend the said Acts" is misleading in its title, and is therefore, unconstitutional and void."

This request is refused.

"Third. The amendatory Act of 21st July, 1913, is invalid and unconstitutional, as it is an attempt to amend non-existing statutes; statutes which have been repealed."

This request is refused.

"Fourth. An amendatory Act, to be valid as such, must relate to an existing statute, and not to one which is non-existent, or one which has been repealed."

This, as an academic question, is affirmed; but we are unable to see that it has any bearing upon the issues involved here.

"Fifth. The title of the Act of 21st of July, 1913, described the Act as amending certain Acts, which did not exist, and as an amendatory Act which is not as a matter of fact."

This request is refused.

"Sixth. The Acts of Assembly under which these proceedings were instituted, having been repealed, the bill of the plaintiff is without warrant of law and should be dismissed."

This request is refused.

"Seventh. The said order and decree of the Court of Common Pleas of Luzerne county, in suit of Ann Watkins v. William D.

Watkins, No. 645½ May term, 1903, remains in full force and effect, and said suit and judgment is a bar to any other litigation on the same subject matter between said Ann Watkins and William D. Watkins, in other courts of law and equity."

This request is refused.

"Eighth. The plaintiff in this action, having brought one suit for the same cause of action, viz: The suit against William D. Watkins No. 645½ May term, 1903, she must finish the same before she can be allowed to prosecute another."

This request is refused.

"Ninth. The whereabouts of the defendant, being known to the plaintiff, prior to the filing of the bill of complaint, the court is without jurisdiction, and the bill must be dismissed."

This request is refused.

"Tenth. To entitle the wife, the plaintiff, to the equitable relief provided by the Act of 1907, as amended by the Act of 1909, she must show *specially* that she is without fault on her own part."

This request is refused.

"Eleventh. There was no desertion of this complainant by her husband. The separation was at her request, and was continued by reason that she refused to occupy the home, he, the husband, made for their occupancy."

This request is refused.

"Twelfth. That the desertion in this case was by the wife, without cause, and not a desertion of the wife by the husband."

This request is refused.

In the argument of counsel for the plaintiff, he earnestly urged that we should allow the sum of one hundred dollars a month in this case, for alimony; but, in the bill filed, we are asked to allow suitable maintenance and support.

Under all the circumstances, we decline to allow the amount asked for, but regard the sum of fifty dollars a month, as the lowest amount which could provide her with the necessaries of life; and we also allow the sum of one hundred dollars for costs and counsel fees, and direct that a decree be drawn in accordance with these findings, adopting, as far as possible, the suggestion we have made, that there should be no seizure or sale of the lands of the defendant, but that provision be made in the decree, whereby the plaintiff shall receive the amount of fifty dollars a month, either by placing a mortgage upon certain portion of the real estate, or by giving bond, with proper security, to be effectual during the pendency of the proceedings, for her support and maintenance.

B. R. Jones, for plaintiff.

J. T. Lenahan, J. A. Opp, for defendant.

MISH & CO. v. LEVY CO. et al.

Common carrier—Replevin—Bond—Contract—Trial.

1. Acts March 11, 1909, P. L. 19, and May 19, 1915, P. L. 543, are identical in effect with Act June 9, 1911, P. L. 838, and while they do not include writ of replevin, still it is dangerous practice to allow consignee to secure possession of goods from common carrier without bill of lading.
2. In such case carrier should refuse delivery under writ of replevin and ask for quashing of the writ. But where possession has been transferred the rights of sureties on bond, and of other parties, will be best conserved by proceeding to trial.

Rule to quash writ of replevin and restore the goods. Common Pleas, Luzerne county. No. 106, May term, 1918.

WOODWARD, J. August 28, 1918.—The plaintiff in this case is a Wilkes-Barre brokerage firm buying merchandise from the producer and selling to wholesale provision merchants, the produce in this case being lima and Roman beans raised by the defendant, A. & H. Levy Co. of Oxnard, California.

The agreement between the parties is contained in a paper called a "Uniform California Bean Contract," partly printed and partly written, a copy of which marked "Petitioner's Exhibit No. 3," will be found in the petitioner's depositions. The original contract is for lima beans; the order for Roman beans was added subsequently by letter. The contract was in triplicate drawn in California, forwarded to plaintiff, executed by him, returned to the defendant and after execution two copies sent back to the plaintiff. The important parts of the contract are as follows:

"Date of sale, 4-5-17.

"Shipment at seller's option not later than Oct., Nov.

"Description: 50,000 lbs. choice recleaned limas, packed in net weight sacks.

"Terms: Sight draft payable ten days from date of shipment.

"Include 50 bags Roman beans if possible at market price.

"Penna 85520,

"Oxnard,

"Dec. 6-17."

This appears to be on the outside or cover of the form of contract.

In the body of the contract appears, *inter alia*, the following:

"Terms: For rail shipment f. o. b. common shipping point California; draft and bill of lading or order attached. *Net cash on arrival and examination at destination of original carload.* Draft payable in New York, Chicago or San Francisco exchange.

*** Draft to be paid ten days from date of shipment from interior point.

"Examination and approval. If shipment is not accepted or

disapproved within three full business days after arrival, contract shall be considered fully complied with on seller's part and invoice if unpaid becomes immediately due and payable.

The words italicized above were erased in the original copy by the defendant by drawing a line through them after the three copies had been executed by the plaintiff and returned to the defendant. The erasure does not appear on the duplicate and triplicate copies sent to the plaintiff after execution by the defendant. This is a material change made by the defendant in the original copy without the knowledge or consent of the plaintiff that would nullify the whole contract if the plaintiff so desired. But the plaintiff stands on the contract as contained in his copies and claims that he was not obliged to take up the draft until he had inspected the beans on their arrival at Wilkes-Barre.

These beans were to have been shipped not later than October or November, 1917.

On November 16, 1917, plaintiff wrote to defendant asking that fifty to one hundred bags of Roman beans at the present price be added to the order if not already shipped, and added as postscript "Would appreciate present quotation." In reply the defendant wrote on November 23, 1917, that they expected to include the Roman beans at a cost of \$11.50 per hundred.

On December 17, 1917, the draft for the beans dated Oxnard, California, December 6, 1917, in the sum of \$5,245.40, and addressed to plaintiff, with the bill of lading attached, arrived at the Miners Bank of Wilkes-Barre. Plaintiff being notified, appeared at the bank and asked them to hold the draft until the arrival of the car.

In the meantime, before the arrival of the draft and bill of lading at the bank, plaintiff had received the invoice in which the Roman beans were billed at \$12.75 per hundred instead of \$11.50 as quoted. Plaintiff thereupon wrote to defendant calling attention to the error, whereupon defendant replied that the \$11.50 quotation had been an error of the typist and that \$12.75 was correct and calling for the immediate acceptance of the draft, which they claimed was payable "ten days from date of shipment from interior point," and was overdue. Plaintiff wrote complaining of the amount of the draft not only on account of the overcharge on Roman beans, but because they had not deducted enough for his commission and said he was having the draft returned for correction. Defendant thereupon wrote, December 27, 1917, cancelling the contract and attempted to divert the car of beans to another customer, H. C. Schwab of Baltimore, who is now asking to intervene as a complainant in this proceeding.

Thus matters stood until March 13, 1917, when plaintiff received notice from the freight agent of the Lehigh Valley Railroad that a car of beans had arrived billed to him. By what error

or accident the car reached Wilkes-Barre instead of Baltimore, to which destination it was supposed to be diverted, does not appear.

The plaintiff had already disposed of a large part of the beans to his customers, wholesale provision merchants, anticipating the arrival of the car, so that when the car arrived unexpectedly he demanded the contents and offered to pay the freight, amounting to \$493.09. The carrier would not deliver unless he produced the bill of lading, which was attached to the draft, which had been returned by the bank to the defendant. The plaintiff thereupon consulted his lawyer, who advised that the only way the beans could be obtained was by a writ of replevin and payment of the freight. Plaintiff thereupon went to the prothonotary's office with his attorney, who drew a praecipe for the writ and an affidavit fixing the value of the goods at "not to exceed \$5,500," and filed a bond executed by the plaintiff and two sureties in the penal sum of \$11,000; the condition of the bond being that if the obligor shall fail to maintain his title to the goods, he shall pay to the party entitled thereto the value of the goods, and all legal costs fees and damages, then the bond to be in full force, otherwise void.

The plaintiff failed to sign the affidavit nor does the paper show that he was sworn, although the prothonotary's clerk testified that he personally swore the defendant but neglected to fill out the blank and have the plaintiff sign it.

The beans having been replevied by the plaintiff were placed by him in storage and have since been delivered to his customers, except a portion which still remains in the warehouse.

Two rules have been granted by this court: One on the petition of H. C. Schwab to show cause why he should not be allowed to intervene as a party defendant and why the writ of replevin should not be quashed; the other on the petition of the Lehigh Valley Railroad Co. to show cause why the sheriff and the plaintiff shall not be directed to redeliver the beans to the Lehigh Valley Railroad Co.

We cannot make absolute the last rule, because the beans are no longer in the hands of the plaintiff or the sheriff. We see no reason why H. C. Schwab should not be allowed to intervene and make that rule absolute. The only remaining question is whether or not to quash the writ of replevin as we might do on technical grounds for the failure of the plaintiff to subscribe the affidavit as to value.

This is what the defendants desire on the supposition that the making absolute the rule to quash would be an adjudication against the plaintiff and a breach of the condition of the bond that would *ipso facto* fix the liability of the defendant and his sureties for the full amount of the bond, being the value of the goods as fixed for the plaintiff. But if the writ is quashed on

account of the failure of the plaintiff to make an affidavit as required by the Act the whole proceeding falls and the bond with it. The defendants would then have recourse only to an action for damages with no security, except the responsibility of the plaintiff. Whereas, if the writ is upheld the case goes to trial on the issue of title to the goods. If the plaintiff fails to maintain his title and judgment is rendered against him his liability and that of his sureties is fixed. This remedy will be more expeditious and more satisfactory to the defendants than an action for damages.

The issuing of the writ of replevin in this case as a means of obtaining the goods without the bill of lading was a misuse of the process of this court which calls for condemnation, and if there were any way of adjudicating the case in this proceeding so as to fix the liability of the plaintiff and his sureties on the bond we would be inclined to take it, but this cannot be done by quashing the writ.

The Act of March 11, 1909, P. L. 19, Section 25, relating to warehouse receipts, and the Act of May 19, 1915, P. L. 543, Section 39, relating to the sale of goods, are identical in effect with the Act of June 9, 1911, P. L. 838, Section 24, which provides that "if goods are delivered to a carrier by the owner * * * and a negotiable bill is issued for them, they cannot thereafter, while in the possession of the carrier, be attached by garnishment or otherwise, * * * unless the bill be first surrendered to the carrier or its negotiation enjoined." While these acts do not in terms include the writ of replevin, yet it would be a dangerous practice to allow the consignee of the goods to secure possession of them in this way without the bill of lading, and if the Lehigh Valley Railroad had refused to deliver the goods without the bill of lading and had come into court and asked to have the writ of replevin quashed before the goods were delivered, no doubt the motion would have been granted; but in the present condition of the case the sureties on the bond are entitled to protection, as well as the defendant, and by allowing the case to proceed to trial on the issue on the replevin, the rights of all parties will be conserved and the questions involved adjudicated after full hearing.

The rule to show cause why the sheriff and the plaintiff shall not be directed to redeliver the goods replevied to the Lehigh Valley Railroad Company, is discharged.

The rule to show cause why H. C. Schwab shall not be allowed to intervene as a party defendant is made absolute; and the rules to show cause why the writ of replevin should not be quashed are discharged.

A. Salsburg, H. H. Weintraub, for plaintiff.
W. H. Goodwin, J. E. Jenkins, for defendant.

SPRAGUE *v.* WHALEN *et al.*

Corporations—Directors—Notice of meetings—Lease—Payment of debts.

1. Money paid by officers of corporation representing majority of stock, to extinguish a just debt, but without authority of the whole board duly notified of meeting, may not, at suit of minority director be recovered as against the creditors, but may be ordered in like sum returned to the treasury to await properly framed action of the board of directors.
2. A lease effected under conditions *supra* will not be abrogated as against the lessors, who were without notice of infirmity in the proceedings.
3. Members of board of directors are entitled to one full day's notice of meetings and action taken without such notification may be rescinded.

Bill, answer and replication. Common Pleas, Luzerne county.
In Equity. No. 9, March term, 1918.

SCHAUER, J., December , 1918.—The following statement puts in a condensed form the findings of the Court as to the cause of action and the facts involved:

This was a bill in equity to restrain the Mountain Paper Company from paying a certain sum of \$2,000 out of its funds to Whalen and Lewis, two of the defendants, which sum they had paid in settlement of a claim against the company, and to prevent the company from paying rent at \$2,000 per year on a certain lease made, and to occupy the premises, a paper mill, under that lease, upon averment that the sum paid and the rental fixed by the lease were excessive, and the contracts under which these payments are to be made improvident.

The plaintiff is one of the directors of the company; Whalen and Lewis, two of the defendants, are the other directors, the board consisting of only three members. Marcy and Murdock, who are also defendants, were lessors in the lease aforesaid, and the persons to whom the \$2,000 was paid on a claim held by them.

This plaintiff and three other persons, including Whalen, in March, 1915, formed a partnership to manufacture paper at Koons' Brothers paper mill at Huntington Mills. Subsequently, the partnership was incorporated under the name of the Mountain Paper Company, and in July, 1915, took over the business that had been established.

At the time when the suit was brought all of the outstanding stock of the company was held by this plaintiff, Whalen and his wife, who were defendants, and by Lewis, another defendant, and by William Gardner, who owned only two shares and was not

a party to this suit. Five shares remained in the company's treasury. Originally, and until January, 1918, the plaintiff was president of the company and managing director. During that period the company became indebted to Marcy and Murdock, lessors, partly for rent and partly for material, the total amount of such indebtedness being claimed by them as in excess of \$2,000. Prior to January, 1918, there was no formal lease, but in lieu of it an agreement had been made between the parties, called by them "a working agreement," under which the lessors were to receive twenty-five per cent. of the net profits as rent. The company became involved and was put into the hands of a receiver. During the receivership Whalen and Lewis arrived at a settlement of the indebtedness of the company with Marcy and Murdock, the other defendants, and paid them \$2,000 in compromise of all claims, taking from them a written lease of the premises at a rental of \$2,000 per annum. All this was done without any formal resolution or action of any kind by the board of directors, the defendants, Lewis and Whalen, assuming that because they formed the majority of the board, and also represented the majority of the stock, no such formality was required. The plaintiff claiming that the indebtedness to Marcy and Murdock was materially less than \$2,000, and that the amount of rental fixed by the lease was unreasonable and that the action of Whalen and Lewis, being unauthorized by the board of directors, was unlawful, filed this bill. Whalen and Lewis have reimbursed themselves out of the company funds for the \$2,000 paid by them in settlement of claims.

DISCUSSION.

If our findings of fact are correct then nothing remains to be considered from the legal side of this controversy, excepting only the effect of the settlement and execution of the lease by the majority of the board of directors, acting in their respective capacities as president and secretary, without authority received at a previous formal meeting of the board held either at a time fixed by the by-laws or specially called with notice to all the members of the board.

We have found as a fact that the corporation was indebted in an amount claimed by Marcy and Murdock (including merchandise and rent) to exceed \$2,000, and that neither the amount agreed upon in the settlement nor the rental fixed by the lease was excessive or improvident.

In *Gordon v. Preston*, 1 Watts 387, Chief Justice Gibson declared that a mortgage made on behalf of a corporation did not originally bind the corporation, "because it was executed not upon a charter day or a day appointed by a by-law, but at a special meeting convened without notice, written or verbal, to the directors who did not attend. When the day has not been fixed by

other competent authority, this notice is indispensable to a legal convention for the transaction of even ordinary business of a corporation."

In *Stoystown Co. v. Craver*, 45 Pa. 386, it was declared that "the company could unite in the change only by its board of directors acting in united council and not by the several members of the board."

In 3 Thompson on Corporations, Section 3905, citing many precedents, it is laid down as a settled principle that in all matters involving the exercise of what might be termed a legislative or judicial discretion which the directors cannot delegate to others, they can only bind the corporation by acting together as a board. A majority of them cannot undertake to act in their individual names for the board itself, and no act can be done affecting the ownership of property except by a resolution of the board when regularly constituted and sitting in consultation. Through the application of this rule it has been held that a deed signed by every member of the board of directors but not in pursuance of any resolution of the signers as a board, will not pass title of the corporation; nor can an act invalid as against the corporation be ratified by the individual consent of a majority of the board. The board of directors to whom the authority to bind the corporation is committed, is not the individual directors scattered here and there whose assent to a given act may be collected by a diligent canvasser, but it is the board sitting and consulting together as a body. (*Ib.* Section 3906.) When they are not consulting together as a board they are regarded as acting privately and unofficially.

And it has been said that "if, therefore, a majority of the directors meet at an unusual time and place without notifying all the members of the board, the acts which take place at the meeting will be void." 10 Cyc. 782.

This rule, so well established, compels us to hold the execution of the lease and the settlement of the claim by Whalen and Lewis were not the act of the corporation, and that as against them this plaintiff has undoubted right to restrain management and action that have not been preceded by formal meeting and resolution on the part of the board of directors. Nor is it sufficient answer on the part of these particular defendants to charge the plaintiff with the same sort of looseness and irregularity while he was in the management of the business. To meet this legal situation the defendants have put in evidence certain facts from which they have requested us to report as a conclusion of law that these particular acts were properly ratified. The meeting of the board at which the ratifying resolution was adopted was held at an unusual time and place. Plaintiff did not receive notice of the meeting until 10 o'clock in the forenoon of the day on which the meeting was held at 3 o'clock p. m. The corporation had adopted no by-law regulating the matter of meetings.

Mercantile Co. *v.* Pittsburg Co., 173 Pa. 30, declares that in the absence of a by-law, or custom to the contrary, at least one full day's notice should be given of a directors' meeting; and that a meeting held on the day on which the notice was received by a director who did not attend, was unlawful. Therefore the action taken by the directors in this case on February 21, 1918, was not effective to ratify the settlement or the execution of the lease.

But it does not follow that because, as between the plaintiff and the defendants who are his co-directors, the former may be entitled to some remedy, he therefore also is entitled to the remedy as against Marcy and Murdock.

The making of this lease was within the general powers of the corporation, and was not inherently *ultra vires*.

There is a distinction between contracts *ultra vires* because wholly outside the power of a corporation and contracts *ultra vires* the directors because defective through some circumstance undisclosed to a party dealing with the corporation. Thus if a deed is executed in the name of the corporation by its proper officers under its corporate seal, this carries with it the presumption that the officers were thereto duly authorized by a resolution of the board of directors where such authority is required by its governing instrument and strangers will be protected in taking such a deed if they act in good faith. 10 Cyc. 1149. 2 Thompson on Corporations, 5978.

So in *Gordon v. Preston*, *supra*, though the meeting of the board of directors was impugned successfully as having been irregular, the mortgage involved was nevertheless upheld, and this notwithstanding mortgagees were members of the mortgagor's board of directors; Chief Justice Gibson announcing that the latter fact "cannot prejudice their title; for, treating with the corporation as individuals and consequently as strangers, they were not bound to inquire into the regularity of the convocation, or to know that some of the corporators had not been summoned. Appearing at the meeting to mingle in the business, not as agents of the corporation but as strangers treating adversely to its interests, they are presumed as corporators to know nothing which a stranger would not be bound to know. And by an application of the same principles a mortgage was sustained in *Manhattan v. Phalen and Manhattan v. Roland*, 128 Pa. 110-119.

Marcy and Murdock were not stockholders or directors in this corporation, and, therefore, have greater equities in their favor than could have been claimed by the plaintiff in *Gordon v. Preston*. They were entirely within their rights when they demanded a settlement of their old accounts and a written lease for a definite rent from this corporation, and they had the right to assume that the president and secretary, who also were the majority of the

board of directors, were authorized according to law to make the settlement and take the lease.

By the prayers of the bill the plaintiff seeks: (1) An injunction to restrain the corporation from paying rent under this lease; (2) from paying \$2,000 under a settlement; (3) from operating the bill under the lease; (4) to have the lease cancelled and declared null and void.

As the money for the settlement has already been paid, it is beyond reach of a prohibitory injunction. We have already stated that Marcy and Murdock were within their rights in making the lease, which consequently is binding upon the corporation. Therefore the plaintiff is not entitled to an injunction to restrain payment of rent or occupancy of the premises by the corporation.

In a fifth prayer we are asked to cause the defendants, Whalen and Lewis, to account in case they have used the funds of the corporation in making this settlement and to repay the same into the treasury.

Whalen and Lewis, having acted without formal authority, specially or generally conferred, had no legal right to draw that money out of the company's funds. As against them we are ready for the time being to assume that the plaintiff has made out a right to a mandatory injunction that the money be returned. This right seems to us to be purely technical and in result academic, as it does not interfere with action that may be taken hereafter by the board of directors ratifying what has been done, or directing its immediate repayment to these defendants.

A question has been raised whether this plaintiff is entitled to a remedy that is not more than technical, and it was argued, citing 10 Cyc. 970, that the misconduct complained of on the part of the governing body of the corporation must work a substantial injury to the corporation or at least to the complaining share-holder, not proved in this case.

We have examined the cases referred to in Cyc. for this principle, but they do not seem to us to be sufficiently clear to justify us at this time in following them. This question may be more fully argued than it has been, on exceptions before the Court *en banc*. We have found that this particular payment was not against the interests of the corporation or the stockholders. Consequently if the legal question just suggested shall also be decided in favor of the defendants then the decree *nisi*, which we herewith enter, must be changed to a general decree dismissing the bill.

CONCLUSIONS OF LAW.

First. The plaintiff is not entitled to have the lease cancelled, or to have an injunction restraining the payment of rent to Marcy and Murdock, or to prevent the Mountain Paper Company from occupying the premises under the lease.

Second. The plaintiff is technically entitled to have Whalen and Lewis return the \$2,000 to the treasury of the corporation, said amount having been used in obtaining the settlement referred to in the bill without preliminary authority received as the result of formal action by the board of directors.

Decree *nisi* that Whalen and Lewis return to the treasury of the Mountain Paper Company the sum of \$2,000 and that the preliminary injunction heretofore granted be dissolved in so far as it restrains the payment of rent under the lease of February 22, 1918, to Marcy and Murdock, trustees, or in any other way interferes with the lawful management of the corporation.

W. A. Valentine, for plaintiff.
M. J. Mullhall, for defendants.
P. L. Drum, for trustees.

SANDERS *v.* THE WILKES-BARRE RAILWAY CO.

New trial—Injury of passenger from collision—Measure of damages—Inadequacy of verdict.

Where in action for damages sustained by passenger in trolley car accident, negligence of defendant admitted, and no contributory negligence of plaintiff, testimony conflicting as to extent of plaintiff's injury, and case is submitted to jury as to amount plaintiff is entitled to, award of \$100 will not be disturbed on ground of inadequacy, said amount covering expenses and medical treatment.

Motion for a new trial. Common Pleas, Luzerne county. No. 281, October term, 1915.

WOODWARD, J., August 20, 1919.—The reason relied on by the plaintiff in his motion for a new trial of this case is that the verdict in his favor for \$100 is inadequate.

He was a passenger on a trolley car of the defendant company, which failed to stop before crossing the tracks of the Lackawanna and Wyoming Valley Railway Company, otherwise known as the "Laurel Line," in the city of Wilkes-Barre, was run into by a Laurel Line car, and one end thrown from the tracks. The doctor's bills and expenses of treatment amounted to \$92, and the jury gave him \$100. The testimony was conflicting as to the extent of his injuries, and we must assume that the jury believed those who said his injuries were negligible. The negligence of the defendant was admitted, nor was there any contributory negligence on the part of the plaintiff. The case was submitted to the jury solely to determine the amount plaintiff was entitled to. There is no complaint about the rulings or the charge of the Court. Under these circumstances we cannot disturb the verdict.

Motion is dismissed and a new trial refused.
C. B. Lenahan, for plaintiff.
F. A. McGuigan, for defendant.

RISHEL *v.* WM. J. BYARS COUNCIL *et al.*

Unincorporated societies—Expulsion of member—Act 1836—Equity jurisdiction—Mandamus.

1. Where member of unincorporated society seeks restoration to membership after expulsion, the remedy—Act 1836—should be mandamus rather than by proceeding in equity by injunction.
2. A branch of such unincorporated society having by due process, as provided in its laws, expelled a member, and the action having been approved by the National body, the fact is accomplished, and member thereafter should seek re-instatement from without, rather than prevention of expulsion from within the society.

Common Pleas, Luzerne county. In Equity. No. 3, October term, 1918.

STRAUSS, J., July 28, 1919.—The Junior Order of United American Mechanics is a beneficial society organized with a National council having supreme jurisdiction over the entire order, State councils, subordinate to the National, with jurisdiction over local councils. The National council, the State council and the local council, known as Wm. J. Byars Council, No. 282, have been joined as defendants in this bill, which prays for injunction to restrain defendants from expelling the plaintiff from Wm. J. Byars' Council and for other relief. The National, the State and Wm. J. Byars Council are respectively incorporated under the laws of Pennsylvania. A National judiciary and a State judiciary exist as instrumentalities adopted for the government of the order and for the trial under its laws of disputes arising within the order.

The plaintiff was charged before the State judiciary with offending against the laws of the order and was there tried, with a resulting judgment of expulsion. He took an appeal to the National judiciary, which affirmed the judgment. Thereupon he filed the bill in equity in this case to prevent the consummation of the judgment and a resulting expulsion of him from Wm. J. Byars' Council and from the order generally.

The National judiciary and the State judiciary have also been named as defendants, but as they are mere agencies of the superior bodies, the fact that they themselves are not separately incorporated is of no consequence. Any action which they direct to be taken is the action of the respective councils under which they are organized. The proceeding before us is to continue a preliminary injunction. Both National and State councils hav-

interposed demurrer by which there is raised *in limine* the question of jurisdiction in equity. The Act of June 7, 1907, P. L. 440, makes it our duty to examine and determine that question in the first instance.

Evidence was presented to us upon hearing of the motion to continue the injunction that the plaintiff has been expelled according to the forms of law adopted by the National and State councils; that the judgment of expulsion has been finally entered; that thereby the defendant is, under its laws, no longer a member of the order, and that this application is substantially one for reinstatement rather than to prevent expulsion.

Cases are numerous in Pennsylvania in which the legal remedy of mandamus was invoked and applied under similar conditions against incorporated societies. The earliest is *Com. v. St. Patrick's Beneficial Society*, 2 Binn. 441, decided in 1810. This was followed by *Com. v. The Penna. Beneficial Institution*, 2 S. & R. 141; *Franklin Asso. v. Com.*, 10 Pa. 357; *Com. v. German Society*, 15 Pa. 251; *Evans v. The Phila. Club*, 50 Pa. 107; *Com. v. Union League*, 135 Pa. 301; *Hibernia Fire Co. v. Com.*, 93 Pa. 254; *Weiss v. The Musical Union*, 189 Pa. 446; *Crow v. Capital City Council*, 26 Supr. Ct. 411.

In all of these except the last the plaintiff was restored to membership of which the defendant, an incorporated society, had attempted to deprive him by expulsion, and in 26 Superior 411, such a decree was reversed on its merits and not on technical grounds.

This jurisdiction was exercised at common law in England against a defendant corporation. (Bagg's Case, Coke's XI, 93, cited by Woodward, P. J., at 50 Pa. 112.)

Our statute regulating the power of the courts to issue mandamus (Act of March 19, 1903, Sec. 1, P. L. 32), has made no change in this respect, but on the contrary expressly confers on the Court of Common Pleas the power to issue the writ "to all corporations being or having their chief place of business within the county, and to any corporation doing business, or having its property in whole or in part within the county, provided that the relief, act, duty, matter or thing, the performance of which is sought, should be given or performed within such county." See also Act June 14, 1836, Sec. 18, P. L. 621.

So on the other hand the statutory power was strictly construed

to apply to corporations only and not to extend to unincorporated societies. Thus in *Wolf v. Schleiffr*, 64 Pa. 252, in which a peremptory mandamus restoring a plaintiff to membership in an unincorporated society had been issued in the court below, the Supreme Court, construing the Act of 1836 (*supra*), reversed outright because no instance could be found "of a writ of mandamus issued by the Court of Common Pleas to individuals in their private relations or to associations having no chartered powers which has reached this court and been supported."

Applying the doctrine of this case in *Manning v. Kline*, 1 Superior 215, that Court said:

"In *Wolf v. Com.*, 64 Pa. 252, in which the Court of Common Pleas, upon a return of the writ of mandamus, rendered a final judgment, restoring the plaintiff to his membership in an unincorporated association, the judgment was, upon an appeal to the Supreme Court, reversed, thus indirectly establishing the principle referred to that a bill in equity is the proper remedy."

And again in *Neff v. The Daughters of Liberty*, 62 Superior 251, President Judge Orlady, after citing 64 Pa. 252 and quoting from the opinion, commented: "The authority of the Courts of Common Pleas to issue writs of mandamus is limited by the cases enumerated in the Act." Therefore the court sustained jurisdiction in equity as being conferred by the Act of June 13, 1836, Sec. 13, Par. 5, which gives to the Courts of Common Pleas "supervision and control of all corporations (other than those of a municipal character) and unincorporated societies or associations and partnerships."

In line with these decisions we find cases in which individual members by proceedings in equity enforced their rights in unincorporated societies as follows: *Foley v. Tovey*, 54 Pa. 190; *Gass' App.*, 73 Pa. 46; *Sperry's App.*, 116 Pa. 391; *Hemphill v. Enterprise Lodge*, 66 Sup. Ct. 136.

The only case that we can find in which an adjudication on the merits resulted in equity where the defendant was incorporated is *Carlin v. The A. O. H.*, 54 Superior 512. The question of jurisdiction does not seem to have been raised. A decree of the Court of Common Pleas having been favorable to the plaintiffs and directing their reinstatement on appeal, the Superior Court reversed the judgment and dismissed the bill on the merits, holding that the plaintiff had been fairly tried after full notice by the tribunals of the society, and that the decision reached was author-

ized by the society's rules, wherefore the plaintiffs "stand convicted by a tribunal of their own selection. The courts entertain jurisdiction to keep these tribunals in the line of order and to correct abuses, but they do not inquire into the merits."

After fully considering these precedents we cannot escape the conclusion that the remedy at law by mandamus is complete against these incorporated defendants. Therefore we are compelled to sustain the demurrer and to dissolve the injunction.

This, however, does not end our duty in adjudicating upon the rights of these parties at this time. The Act of June 7, 1907, Sec. 1, requires a defendant who desires to raise the question of jurisdiction in equity upon the ground that the suit should have been brought at law, to do so by demurrer or answer, or by praying the court to award an issue or issues to try questions of fact. If he fails to do this the right of trial by jury shall have been deemed to have been waived by both parties and the cause shall proceed to a final determination by the court, and upon appeal with the same effect as if upon a hearing before the court without a jury upon agreement filed.

"If," still quoting from the statute, "a demurrer or answer be filed averring that the suit should have been brought at law that issue shall be decided *in limine* before a hearing of the cause upon the merits. * * * If the court shall decide that the suit should have been brought at law, it shall certify the cause to the law side of the court at the costs of the plaintiff; and no further proceeding shall be had at the instance of the plaintiff until these costs are paid, except that he may appeal from the order made; and the defendant in addition shall be entitled at any time to enter and serve a rule to show cause why the suit should not be dismissed unless the costs are paid within fifteen days."

These defendants have done all that the statute requires of them to obtain the judgment of this court *in limine* on the jurisdictional question. Accordingly we shall certify this cause to the law side of the court, the bill in equity and the service thereof to stand as a petition for mandamus against the defendants requiring them to reinstate the plaintiff to his membership in the order, to have the same force and effect as if an alternative writ of mandamus had been issued and had been returned served. The plaintiffs may within thirty days amend the bill, now to be called the petition, in such manner as may seem necessary under the circumstances, more especially in the form of the prayer for relief.

After such amendments have been made and served on the defendants or their attorneys respectively, the defendants shall have thirty days within which to file their answers or return to the alternative writ, the case thereafter to be proceeded with as if it had been originally begun on the law side of the court.

W. A. Valentine, F. P. Slattery, for plaintiff.
B. F. Myers, G. J. Clark, for defendants.

GLENNON *v.* HROBAK.

Amicable sci. fa.—Opening judgment—Wife surety for husband—Evidence—Forged signature.

1. Where in amicable *sci. fa.* to revive judgment on note signed by husband and wife, her signature denied as a forgery, but where, despite expert testimony, there is ground for believing signature genuine, judgment may be opened and defendant allowed to defend, and
2. Where proceeds of note were applied partially to improvements on wife's real estate, with her knowledge thereof, despite her averment of suretyship for husband, rule to strike off amicable *sci. fa.* will be discharged without prejudice to renewal of the motion after trial of the issue.

Rule to strike off judgment or to open it and to strike off amicable scire facias. Common Pleas, Luzerne county. No. 653, December term, 1912, D. S. B.; No. 511, December term, 1917, Am. Sci. Fa. to revive.

STRAUSS, J., September 12, 1919.—The defendant, Stanislawa Hrobak, seeks to avoid this judgment on averments that:

1. The judgment note on which the original judgment was entered and the amicable *scire facias* reviving it, both admittedly signed by her husband and apparently by herself, were as to her forgeries.
2. The note was not taken for her own debt but to make her a surety for her husband.
1. She has testified denying the signatures "Stanislala Hrobak" on the note and "Stanislawa Hrobak" on the amicable *scire facias*, and has called two witnesses claiming to be experts in handwriting who gave it as their opinion, after comparison of several admitted signatures with those in dispute that the disputed writings are not in her hand. On the other hand each paper has a subscribing witness who has no interest in the suit unless we infer such interest from the mere fact of employment by the plaintiff as salesman or collectors in his business. One of these witnesses has testified to seeing Stanislawa Hrobak actually write her name on the judgment note, and the other to seeing her write her name on the amicable *scire facias*.

Thus we have as to the fact of signature oath against oath. There is nothing to corroborate her except the opinion of the so-called experts. An examination of the signatures themselves and comparison between them and the admitted standards convinces us that the signatures are genuine notwithstanding the opinion of experts. There is more discrepancy between the admittedly genuine signatures than between these disputed writings and the

genuine ones. In the first genuine signature she spells her name Stanislwa and Hrobak becomes "Hroberk" or "Hrobesk". In the second genuine one Hrobak becomes "Krobak", and in the last, which was the signature upon the jurat accompanying the petition to have the judgment opened, she spells her name Stanislava. The mistake of signing "Stanislaa" is not one likely to be made by a forger. On the contrary he would be likely to imitate a genuine signature with special care.

The general characteristic of the disputed handwriting, the formation of letters, the lack of shading in the strokes and other similarities to the standard writings convince us of the genuineness of the papers. The expert testimony is just that sort that can be obtained almost for the asking. If not from one then from another person who giving credit to the assertion of forgery might through the force of suggestion in perfect good faith express the desired opinion.

2. There is more difficulty with the second proposition. The defendant wife was in April, 1912, the owner of a house and lot. She and her husband, the other defendant, appear to have planned to change the house so that it should become fitted for a license to sell liquor. The husband made application to the plaintiff for \$2,400, to be used for that purpose, and gave his judgment note, which was accepted by the plaintiff, under the impression that the title to the land was in the husband. At the same time the husband executed a negotiable note which the plaintiff had endorsed and discounted at a bank in the city of Pittston, on which payments were from time to time made and renewals given and discounted until the debt had been reduced to about \$1,400. The husband received the money and applied it for the improvement of the property with the wife's consent. In November, 1912, the plaintiff having discovered the wife to be the owner of the property, obtained from her and the husband a new note for the same debt. The proceeds of the loan were expended at least partially in improving the house. It is now claimed by the wife that even if the note were conceded genuine, it would still be worthless because given by the wife as surety, and, therefore, void through the disqualification to become a surety to which the wife still remains under existing law.

The depositions that have been presented to us on behalf of the plaintiff have been carelessly taken. Almost all of the questions asked by the plaintiff's attorney were "leading", and, therefore, justly subject to the objection which was noted wherefore they would have to be excluded. Thus there really remains very little direct evidence for the plaintiff on this phase before us. The facts, however, as we have stated them, are easily deducible from all of the relevant and admissible evidence presented on behalf of the plaintiff and defendant.

We are not ready to say that it is perfectly clear that the wife did sign the note as her husband's surety and not as the real debtor with the purpose of securing the money which had been borrowed for the improvement of her own estate; nor can we, in view of the defective state of the depositions offered on behalf of the plaintiff, arrive at an opposite conclusion from any legal evidence. There is, therefore, nothing left for us to do but to make the rule absolute as to the original and to refuse to strike off the amicable *scire facias* until after the trial of the issue.

Rule to open judgment No. 635, December term, 1912, is made absolute, defendant is allowed to defend; the note to stand as statement and issue is hereby framed on plea *non assumpsit*; the rule to strike off *am. sci. fa.* in No. 511, December term, 1917, is discharged without prejudice to renewal of the motion after trial of the foregoing issue.

D. J. Glennon, for plaintiff.
B. W. Davis, for defendant.

KUMMERER *v.* MARCINIAK.

Interpleader—Sale without transfer of possession—Jurisdiction of Court.
Where A, obligor on bond, had judgment recovered against him, followed by levy on goods which he has sold to another, B, without transfer of possession, petition of B, interpleader, for issue to determine ownership of goods will be denied. In circumstances as above, question is for the Court.

Rule to interplead. Common Pleas, Luzerne county. No. 628, March term, 1919.

WOODWARD, J., July 21, 1919.—In this case the defendant in the interpleader, Mary Marciniak, entered judgment for \$1,500 and interest against the obligors on a bond given to her by Harry J. Kummerer and Mary H. Kummerer on September 9, 1915, to No. 216, July term, 1918. An alias *fi. fa.* was issued by Mary Marciniak on this judgment and the sheriff was directed to make a levy on certain household goods in the possession of Harry J. Kummerer and Mary H. Kummerer at No. 21 East Buttonwood street, Hazleton, Pa.

Lucetta Kummerer, the grandmother of Harry J. Kummerer, and the plaintiff in this rule, claimed the goods so levied upon as her property, and the sheriff thereupon entered the rule for an interpleader to determine the title to the goods.

From the depositions taken on the rule it appears that on February 9, 1915, Harry J. Kummerer and Mary H. Kummerer made a bill of sale of the goods to Lucetta Kummerer to secure her for a loan of \$1,700, but the goods remained in the possession of Harry J. and Mary H. Kummerer, with no notice to Mary Marciniak or any one else outside of the parties to the bill of

sale, either actual or constructive, of any change in the ownership, nor was there any change in the possession of the goods from that time to the time of levy.

The law is well settled in this State that a sale of personal chattels must be accompanied by an actual delivery of the goods to the vendee or it will be fraudulent as to the creditors of the vendor, and the question is for the Court and not for the jury.

There being no dispute about the facts in the case the rule must be discharged.

Rule to show cause why an issue shall not be framed to determine the ownership of the goods is hereby discharged.

F. P. Slattery, for plaintiff.
N. M. Curcio, for defendant.

Court of Quarter Sessions of Luzerne County.

COMMONWEALTH *v.* URBAN.

Foreign-born resident—Firearms—Indictment.

Indictment charging foreign-born resident with owning firearms should aver that he has been for ten successive days a resident of the Commonwealth.

Indictment of foreign born resident for unlawfully owning a revolver. Motion to quash. Quarter Sessions, Luzerne county, No. 203, September Sessions, 1919.

STRAUSS, J., November 22, 1919.—The Act of May 8, 1909, P. L. 466, as amended by the Act of July 11, 1917, made it unlawful for any unnaturalized foreign-born resident to own or be possessed of a shot gun or rifle of any make or a pistol or firearm of any kind.

The second section of the Act of 1909 defined an unnaturalized foreign-born person who shall reside or live within the Commonwealth for ten successive days shall be considered a resident. In this respect the statute was exactly similar to the Act of June 1, 1915, forbidding an unnaturalized foreign-born resident to own or be possessed of a dog of any kind.

The indictment before us does not contain a clause or averment that the defendant had been a resident of the Commonwealth for a period of ten successive days.

President Judge Fuller in No. 134, June Sessions, 1919, Com. *v.* Andrew Muschalla, quashed an indictment drawn under the latter Act because it failed to set out this particular averment. That precedent rules this case.

District Attorney, for Commonwealth.
C. M. Bowman, for defendant.

Court of Common Pleas of Luzerne County.**EIPPER v. EIPPER *et al.***

Injunction—Sale real estate—Husband's courtesy in wife's property—Conspiracy.

1. Where husband seeks injunction against sale of wife's property—husband and wife living apart—urging conspiracy between wife and son to deprive husband of his courtesy, he must show affirmatively and by preponderance of evidence that such conspiracy exists.
2. Thus where wife has received for some years regular sums from the son, not as gift but as loan, money deposited to their joint credit in bank, wife using part necessary for her living, and the proposed sale of her property is to extinguish the debt which has been clearly shown to exist.

Motion to continue preliminary injunction. In Equity. Common Pleas, Luzerne county. No. 7, July term, 1919.

STRAUSS, J., November 19, 1919.—The bill charges that Mary E. Eipper, the wife of the plaintiff, and David C. Eipper, his son, the defendants, in pursuance of a conspiracy to defraud the plaintiff out of his courtesy under the laws of Pennsylvania in the real estate of the wife, and caused to be entered a judgment to No. 222, July term, 1919, in the Court of Common Pleas of this county for the sum of \$4,208.72, in which the son was plaintiff and the wife was the defendant, and had caused to be issued a writ of *fieri facias*, and had advertised the said real estate for sale June 28, 1919, at 10 o'clock.

The preliminary injunction heretofore granted prevented the sale at the time named, and the present application is to continue that injunction.

The plaintiff has produced no evidence except that obtained through cross-examination of the defendants. From that evidence it appears that David C. Eipper graduated at Harvard College in 1908, and since that time he has been earning considerable sums of money, ranging from \$1,000 a year immediately after his graduation to \$2,000 a year at the present time, in addition to board and lodging, which have been as a general thing included in his contract for compensation; that the greater part of this money has been sent to his mother and deposited by her prior to 1913 altogether in a savings account at the Second National Bank at Wilkes-Barre, and after 1913 partly in savings and partly in check account. The money thus deposited was jointly in his mother's and in his own name; that his mother had the privilege of using

what she needed for her own support, but that the money thus advanced to her was not a gift but a loan.

We have been able to find no evidence of conspiracy or fraud. Plaintiff in the brief submitted argues that—

"Upon the merits of the controversy plaintiff takes the position that sufficient doubt has been cast upon the *bona fide* character of the transaction to warrant the continuing of the injunction. In view of the fact that they both testified that eleven years ago there was an express and distinct understanding between them that the creditor should advance money to his mother, which was to be treated as an indebtedness, and that neither of the parties keep any account or memorandum of the amounts advanced, and that the defendant in the execution is willing and anxious that the real estate in question be sold, together with the fact that they concededly discussed the sale of the real estate before the judgment was given, and the further fact that neither one was able to testify in detail as to how this indebtedness was made up, and that during the period from 1913 to 1917, during which time the plaintiff in the execution claims to have advanced the sum of \$1,050, he actually deposited in his account in the bank more money than his salary amounted to, which seems to demonstrate that he did not advance by way of cash payments to his mother the amounts which they have contended; especially in view of the fact that the statement made by the plaintiff in the execution, showing how this indebtedness came about, set forth that this \$1,050 had been retained by the execution defendant from checks forwarded to her, whereas his testimony was to the effect that he advanced the greater part of this money in cash."

We cannot find that these circumstances justify the conclusion of conspiracy or fraud. The defendants have substantially established the indebtedness, and have shown how the payments were made.

We do not think it necessary to go into details of the evidence at this time, all of which we have carefully considered; the fact that no accounts were kept between mother and son when they had at hand the documents from which the accounts could easily be stated; the usual confidence that exists between mother and son where the relations are friendly, shown to have been in existence here; the fact that the mother had no sufficient income for her support, she living separate from her husband, the plaintiff; and all the other circumstances are just as consistent with the truth of the testimony given by the defendants as they are with the plaintiff's theory.

In order to maintain the bill the plaintiff must make out a case affirmatively by the preponderance of evidence, and that he has not done. Injunction denied.

B. W. Davis, W. A. Valentine, for plaintiff.
J. T. Lenahan, for defendants.

WEAVER v. LEHIGH VALLEY R. R. Co.

Workmen's compensation—Jurisdiction of Board—Interstate commerce—Certiorari.

1. Jurisdiction of workmen's compensation board must be found before the board may consider a case on its merits, and a finding without determination of jurisdiction is a gratuity.
2. Finding by referee that a claimant was at the time injured engaged in interstate commerce ousts referee's authority to proceed.

Certiorari to workmen's compensation board. Common Pleas, Luzerne county. No. 685, December term, 1917.

Garman, J., March , 1919.—The claimant, Mrs. Ella Weaver, filed her claim with the workmen's compensation board for Pennsylvania, on June 27, 1917, and on the following day the claim was assigned to George W. Beemer, referee of the third district of the bureau of workmen's compensation and hearing was had July 23, 1917.

The defendant answers claimant's petition as follows:

"The defendant denies that he is liable to pay compensation under the facts alleged in the claimant's petition for the following reasons:

(1) The defendant was engaged in an act connected with interstate commerce when the accident of which the complainant complains is said to have occurred.

(2) The death of the decedent was not the natural result of any violence to the physical structure of his body or of the resultant effects of such violence as provided for in Section 301 of the workmen's compensation Act of 1915.

(3) No injury was received by the decedent which arose out of or in the course of his employment."

The learned referee found the following facts:

"That Frank Weaver, the deceased husband of the claimant, Mrs. Ella Weaver, did not die as the result of an accident occurring in the course of his employment with the defendant, the Lehigh Valley Railroad Company.

"That the said Frank Weaver, deceased, did not at any time suffer any violence to the physical structure of his body by accident in the course of his employment with the defendant.

"That the said Frank Weaver died on March 13, 1917, from natural causes, namely myocarditis.

"That the said Frank Weaver, at the time it is alleged by the claimant that he sustained fatal injury, was engaged in an act connected with interstate commerce for the defendant; and, at

the same time, the defendant was a common carrier engaged in interstate commerce."

Upon these findings of fact the referee decided as a matter of law that the claimant and any of the surviving defendants of the said Frank Weaver were not entitled to an award of compensation under the Pennsylvania workmen's compensation Act of 1915 for two reasons:

"First, because the said Frank Weaver did not die as the result of any accident occurring in the course of his employment with defendant, and

"Secondly, because whether or not the said Frank Weaver had died as the result of an accident occurring in the course of his employment with the defendant, the said Frank Weaver, at the time it is alleged he sustained a fatal accidental injury in the course of his employment with the defendant, was engaged in an act connected with interstate commerce."

From the action of the referee, the claimant appealed to the workmen's compensation board, one of her grounds of appeal being that "the question of jurisdiction and right of the board to entertain this claim, notwithstanding the application made in the case, inviting such jurisdiction is questionable."

The defendant still adhered to its contention that there could be no recovery because at the time of the injury decedent was engaged in interstate commerce.

On the appeal the workmen's compensation board, on a consideration of the evidence declined to reverse the referee in his disallowance of compensation and dismissed the appeal but held that it was "not necessary to consider the question whether the defendant was engaged in interstate commerce at the time it is contended the decedent was injured."

From the decision of the compensation board the claimant has brought the matter into this court by appeal and certiorari.

The jurisdiction of the referee and of the board of compensation have been questioned, a finding by the referee that decedent was, at the time of his injury, engaged in interstate commerce effectually ousts his authority to proceed otherwise than to dismiss the proceedings.

We are of the opinion that the question of jurisdiction of the board being a vital one must also be found before the board can determine a case upon the merits; and any finding without a determination of the jurisdiction is a mere gratuity.

We therefore reverse the finding of the board of compensation but dismiss the plaintiff's claim on the ground that the claimant and defendant were at the time of accident engaged in interstate commerce and that the workmen's compensation board of Pennsylvania has no jurisdiction of the case.

E. A. Lynch, J. McQuade, for plaintiff.

J. R. Halsey, for defendant.

LUTES *et al.* v. RANDALL.

Ejectment—Title—Sheriff's deed—Acknowledgment after years.

Land of A was sold on *lev. fa.* by sheriff, 1887, and purchaser, B, went into immediate possession. B died, 1910, but his heirs remained in continuous possession until 1914, when A, finding land unoccupied, went upon it and set up claim of title because sheriff's deed was not acknowledged until 1915, and that deed was then impossible of delivery to B, who was dead.

Held—Acknowledgment by sheriff is essential in order to complete purchaser's right of possession against execution defendant, but its lack does not withdraw from a purchaser in actual possession the right to depend upon his deed as assurance of title that will support possession.

Acknowledgment may be made even after a long lapse of time.

Motion for judgment in favor of defendant n. o. v. Common Pleas, Luzerne county. No. 1159, October term, 1917.

STRAUSS, J., November 6, 1919.—This is an action of ejectment by Wilbur S. Lutes and Lyman R. Lutes, sons of Judson Lutes, against Cullen B. Randall, who was a son of Ackley Randall.

Prior to May 14, 1887, Ackley Randall was the owner of the land described in the writ. He held it subject to a mortgage owned by Judson Lutes upon which a judgment was recovered against Ackley Randall by amicable *scire facias* and confession to No. 408, May term, 1887, April 21, 1887, for \$470. On this a *levari facias* was issued to No. 98, May term, 1887, and it was duly returned by the sheriff, Hendrick W. Search, that on May 14, 1887, he had sold the land to Lutes for \$105.

Lutes took possession at or about the time of the sheriff's sale in 1887. The said sheriff executed a deed to Judson Lutes on May 21, 1887, but did not acknowledge it until January 25, 1915, when in pursuance of an order of this court made January 8, 1915, in No. 408, May term, 1887, he appeared in open court and acknowledged the deed. A record of said acknowledgment was entered in sheriff's deed book No. 24 in the prothonotary's office of said county at page 142; a certificate of which was duly endorsed January 25, 1915, on the deed, which was recorded in Luzerne county recorder's office at deed book No. 506, page 17.

On March 16, 1896, Judson Lutes conveyed the land to the plaintiffs by deed duly recorded December 28, 1897, in deed book 367, page 436. Judson Lutes died January 3, 1909.

During the entire period between the date of the sheriff's deed and 1914, he and the plaintiffs after him were in undisturbed pos-

session, leasing the land to tenants in some years, and taking off the hay in others, paying the taxes annually without suggestion on the part of anybody representing the defendant or Ackley Randall that the plaintiff's right was disputed.

Ackley Randall died October 16, 1910. On December 2, 1914, the defendant, a son of Ackley Randall, obtained from his mother, Ermina Randall, and from the other children of Ackley, Harry Randall and Mary E. Bissell (her husband, Floyd E. Bissell joining) a deed, thus acquiring whatever title may still have been outstanding in Ackley.

In October, 1914, the defendant, finding the land apparently unoccupied, went upon it, "put a Mr. Hadsell in," declared that he was taking possession and has been in actual occupancy ever since. To restore possession to the plaintiffs, this suit was brought.

The defendant relies for a justification of his claim of title and right of possession upon a single proposition, viz.: The acknowledgment of the sheriff's deed on January 25, 1915, was too late:

(a) Because the sheriff had no power or authority after twenty-seven years' delay to acknowledge the deed;

(b) Judson Lutes having died in 1909, the acknowledgment is void and passed no title to the grantee named therein, for the reason that a deed cannot be acknowledged and delivered to a dead man.

Other reasons have also been assigned but they do not seem to us sufficiently persuasive to require discussion in view of the conclusion at which we have arrived on those above stated.

We are of opinion that the sheriff had full power and right to acknowledge the deed notwithstanding the long lapse of time.

In *Duncan, Lessee, v. Robeson*, 2 Yeates, 454, the deed was not acknowledged until twenty-eight years after the sale and then only after the ejectionment in which the deed was an essential element of title had been begun.

In *Moorhead, Lessee, v. Pierce*, 2 Yeates, 457, an unacknowledged sheriff's deed was permitted to be put in evidence and the Court declared:

"As to the want of an early acknowledgment of a sheriff's deed, we determined yesterday in the case of *Duncan, Lessee, v. Robeson*, that it derives its validity from its execution, and that the first act is respected in law. * * * The usage of acknowledging

sheriff's deeds of lands in the term succeeding the sale, is certainly attended with many conveniences and ought to be followed. * * * The words of the Act, however, (1705—requiring the sheriff to give the buyer a deed duly executed and acknowledged in court) are only directory and do not invalidate a sheriff's deed for want of an acknowledgment in court. * * * On the whole, we think that the present deed may be supported without the usual acknowledgment after so great a lapse of time and no objection made to it by the debtor. But in its operation it is subject to every exception which may be had against a sheriff's deed on its acknowledgment being tendered in court."

Bellas v. McCarty, 10 Watts, 21, rules that a purchaser at sheriff's sale "acquires an interest in the land although the deed may not have been acknowledged. This interest descends to his heirs and it may be taken in execution. The purchaser or his heirs may call for the execution of the deed by payment of the amount of the bid, and the Court on proper application may compel the sheriff to acknowledge the deed."

To the same effect is *Stover v. Rice*, 3 Wharton, 21, a case in which the sheriff executed the deed but never acknowledged it (the costs not having been paid). Notwithstanding this the purchaser went into possession and continued in possession for several years before another title was set up under another sheriff's sale, based upon the theory that the first sheriff's sale was void because the deed had not been acknowledged. Judge Gibson said: "Nothing is clearer than that (the purchaser) at the sheriff's sale acquired an inchoate right * * * and consequently an estate in the premises. * * * His ownership was complete in every respect but a formal transfer of the title."

In *Adams v. Thomas*, 6. Binn. 254, it is stated: "The acknowledgment of the sheriff's deed is no part of the deed; it is only the sanction of the Court to the act of the sheriff. The practice has been for sheriffs, after their term of office has expired, to acknowledge deeds for lands sold by them and executed whilst they were in office, and the Court is of the opinion that such acknowledgments are sufficient."

In *Hardenburg v. Beecher*, 104 Pa. 23, it was said: "A purchaser at a sheriff's sale before his deed has been acknowledged has an inceptive title in the land. * * * The subsequent acknowledgment and delivery of the sheriff's conveyance inures to the

benefit of lien creditors, and, as in the case of a private individual sale, the incumbrancer by relation has the benefit of his security to the extent of the whole estate. Such an estate is attended with the ordinary consequences of sale by an individual. The title acquired under the sheriff's deed relates back to the time of sale and not merely to the date of deed. *Hoyt v. Koons*, 7 Harris, 277. But not so as to wholly divest the legal ownership of the debtor who until the acknowledgment of the deed is entitled to possession with its attendant advantages; 7 Wright, 342. * * * The purchaser has by his mere purchase acquired no title to the present enjoyment. * * * But if the debtor voluntarily abandoned possession of the land and surrenders to the sheriff's vendee, he loses all these attendant advantages. If the vendee enter under these circumstances, he is lawfully in possession. The subsequent acknowledgment of the deed gives him title by relation from the date of the sale."

In the case before us the defendant went out of possession, so far as we can learn, very promptly after the sheriff's sale and set up no claim of title or possession subsequently. The purchaser went into actual possession and until 1914 neither he nor his successors in the title, viz.: his sons, who were his heirs, as well as the grantees under a deed from him, were in no manner disturbed. Then the defendant obtained possession and set up a claim of title based (as we have already stated) entirely upon the lack of acknowledgment of the sheriff's deed. In our opinion the defendant had no right to enter upon the possession as he did. Ackley Randall having surrendered possession, or permitted the purchaser at the sheriff's sale to take possession, lost whatever rights remained in him to continue in possession between the date of the sale and the acknowledgment of the sheriff's deed. This deed, however, was actually acknowledged before the ejectment suit was brought, and in that respect the case is a stronger one in favor of the plaintiff than *Duncan v. Robeson*, 2 Yeates, *supra*, where the deed was not acknowledged until after the ejectment had been brought; and *Stover v. Rice*, 3 Wharton, *supra*, where the deed was never acknowledged at all, though there the controversy was not between a sheriff's vendee and the debtor, but between one sheriff's vendee and another, claiming under a subsequent sheriff's sale which had been caused upon the theory that

the first sheriff's sale was void through the lack of acknowledgment of the deed.

It should also be remembered in this controversy that the acknowledgment in open court by the sheriff is a judicial act and concludes all mere irregularity however gross in the process and sale. "After acknowledgment the validity of the title acquired by the purchaser cannot be questioned by any collateral action involving the title, except for the absence of authority, or the presence of fraud in the sale." *Lee v. Newland*, 164 Pa. 365: *Cock v. Thornton*, 108 Pa. 640.

As the acknowledgment of the sheriff's deed relates to the date of the sale, and thus retroactively completes a title which was inceptively begun (*Demmy's App.*, 43 Pa. 169), we fail to see how the death of Judson Lutes, intervening between the date of the sheriff's sale and the acknowledgment, changes the situation or the rights of the parties.

In *Moorhead v. Pierce*, *supra*, the Court considering a similar question supposed "a sheriff to execute the deed and receive the money on one day and to die, or become incapable of acknowledging it afterwards;" under these circumstances the Court said: "It would be hard to say that the deed was defective on that account and that a new sale must be had."

In the same way let us suppose that Judson Lutes had died on the day after the sheriff's sale and after paying the purchase money, and that the sheriff had duly acknowledged and delivered the deed in his name, would it be held that the title failed because of the incident that the purchaser died between the two dates? It seems to us perfectly clear under the principle that the acknowledgment is to be referred to the date of the sale as a ministerial act on the part of the sheriff completing the inceptive title to which we have already referred, the deed would have been sufficient and the title would be good. If the defendant has any ground upon which the acknowledgment might be set aside, that ground should be presented by direct attack in the court which took the acknowledgment. Until it shall be so set aside, it must be accepted as sufficient in this collateral proceeding.

On the whole, it seems to us from a study of many decisions that acknowledgment of the sheriff is essential in order to complete the purchaser's right of possession against the execution

defendant; but its lack does not withdraw from a purchaser in actual possession the right to depend on his deed as an assurance of title that will support that possession against the former owner who has voluntarily surrendered it, and always against trespassing strangers.

Motion for judgment *n. o. v.* upon the question reserved by the Court, is refused, and judgment directed in favor of the plaintiffs upon the verdict.

G. J. Clark, for plaintiffs.

D. O. Coughlin, Rush Trescott, for defendant.

VEDERMAN *v.* C. R. R. OF N. J.

Foreign corporations—Service of summons—Constitution—Acts 1851, 1911.

1. Acts 1901 and 1911 do not prescribe exclusive method of service on foreign corporations having office in county where process is served—as otherwise they would conflict with Art. 16, Sec. 5, of Constitution. Use of word "may", instead of mandatory "must", gives evidence that "may" alone was intended.
2. Service therefore upon defendant company "by handing to A—their clerk in charge of their depot in W— county and State aforesaid he being a clerk and the person in charge thereof, true and attested copy, etc.," is good.
2. Facts that service was made at the regular office of the company in the county, and upon the agent there in charge, must be established.
4. See *Vederman v. Central R. R.*, 20 Luzerne, 194.

Certiorari. Common Pleas, Luzerne county. No. 590, March term, 1918.

STRAUSS, J., October 14, 1919.—By opinion filed May 9, 1918, we reversed this record, because we then held that (following *Liblong v. Kansas Fire Ins. Co.*, 82 Pa. 433) service on a registered foreign corporation is regulated by statute requiring the appointment of a registered agent upon whom such service may be made, wherefore when as in the case at bar such agent has been appointed the service must be on him and not on an agent unauthorized to receive service though empowered to act for the company in some other matter, in this case on an agent who was a clerk in charge of the defendant's depot at Wilkes-Barre.

On May 13 we ordered a reargument of the case, because then our attention was called to the case of *Carr v. Aetna Co.*, 263 Pa. 87, which had been decided on January 4, 1919. That case clearly

decides that service on a foreign corporation is not necessarily limited to its State agent appointed to receive service of process. The opinion of Mr. Justice Simpson lays special stress upon Art. 16, Sec. 5, of the Constitution under which "no foreign corporation shall do any business in this State without having one or more places of business and an authorized agent or agents in the same upon whom process may be served;" and in discussing the several possible constructions of this section he says: "The evil to be remedied was the difficulty in serving process upon foreign corporations doing business in this State. It is our duty to advance the remedy, and we are satisfied that it can be done only by holding that the 'agent or agents' must be at the 'one or more places of business,' and agent if there be one and agents if there be more than one place of business."

In that case the suit was against a foreign Insurance Co. which had complied with the Act of June 1, 1911, designating the insurance commissioner of the Commonwealth and his successors agents upon whom process might be served. The summons was not served upon the insurance commissioner but upon an assistant manager of the defendant who had not been designated as an agent to receive service of process, but who, according to the sheriff's return was in charge of the defendant's office and known place of business in the city of Pittsburg. The issue was made upon a petition to set aside the service and answer averring, "that the person and officer upon whom the service was made was not casually within the jurisdiction but was in regular attendance at said office at the time he was served and the defendant company was fully apprised of the suit." No testimony was taken. The case was heard upon petition and answer, and the opinion of the Supreme Court seems to indicate that the sheriff's return could not be contradicted and that the averment of the answer being responsive overcame by denial the averments of the petition. It was thus established that the defendant had an office in the county in which suit was brought, and that the agent in charge of the office was served. Under these circumstances a service apparently in accordance with the requirements of the Act of April 8, 1851, Section 6, was upheld notwithstanding the Act of June 8, 1911, permitting service on the secretary of the commonwealth as the designated agent of the defendant, and it was held that this Act

did not prescribe an exclusive method of service, otherwise it would have been unconstitutional, the Court saying: "The use of the word 'may' instead of the mandatory 'must' or 'shall' is reasonably strong evidence that 'may' alone was intended;" citing *Kline v. The Western Maryland Rwy. Co.*, 253 Pa. 204, where a similar service upon a foreign corporation had been upheld. In passing, it is of interest to note that *Liblong v. The Kansas Co.*, *supra*, involved the construction of a statute of 1873 antedating the constitution of 1874.

In the case before us the service was upon "the defendant company * * * by handing to A. D. Petry, their clerk in charge of their depot at Wilkes-Barre, county and State aforesaid, he being a clerk and the person in charge thereof, a true and attested copy of the within summons."

The Act of 1851 provides that the original writ "may be served upon the president, cashier, agent, chief or any other clerk * * * of such company within the county, and such service shall be good and valid in law to all intents and purposes."

True, there was added to the return of service a statement that the constable was "unable upon inquiry (at said office) to ascertain the residence of any of the said officers of defendant company within the county," a statement apparently made in deference to the requirements of the Act of July 9, 1901, which also provides a method by which service upon a foreign corporation "may" be made; which, however, must (*Carr v. Aetna*, *supra*) be adjudicated as not prescribing an exclusive method of service, and, therefore, not repealing the Act of 1851. The additional statement contained in the return of service is mere surplusage and does not detract from the efficiency of a service which complies with the requirements of the Act of 1851.

It follows, therefore, that the proceedings in this case must be affirmed.

Order heretofore made reversing the proceedings is revoked, and the proceedings are now affirmed.

M. H. Salsburg, for plaintiff.

G. S. McClintock, for defendant.

BARTELS BREWING CO. v. MASLOWSKI *et al.*

Scire facias—*Affidavit*—*Amendment*—*De bene esse*—*Appeal*—*Mortgage*—*Jurisdiction*.

1. Filing of affidavit with summons as required by Act 1901, P. L. 617, as amended by Act 1903, P. L. 261, in writ of * * * *scire facias*, etc., is purely procedural and it may be filed *nunc pro tunc*. Failure to file halts plaintiff until the proper parties have been brought on the record.
2. As error in not filing affidavit does not abate action, it may be corrected by amendment and omitted parties summoned to court by service of rule to appear and plead.
3. Appearance *de bene esse* is to enable defendant to question the jurisdiction. Where such question is raised defendants should promptly move to strike off service of the rule, and in case of refusal, to appeal to higher court. It is too late to raise the question of jurisdiction after jury is sworn.
4. Where borrowing and giving of mortgage security is legally accomplished—as where retail liquor dealer borrows from brewing company, incidental promise of borrower to buy beer exclusively from said company would be unenforceable against mortgagor. And mortgagor cannot by illicit, incidental, or collateral promise escape payment of his just debts.
5. One having just claim on which he has brought suit in Common Pleas may at the same time appear in Orphans' Court and attempt to prove his claim, without losing right to proceed in Common Pleas if the claim is contested.

Defendants' motion for judgment n. o. v. Common Pleas, Luzerne county. No. 691, May term, 1915.

STRAUSS, J., August 20, 1919.—This is an action of *scire facias* *sur mortgage* in which the Court at the trial gave binding instructions to the jury to render a verdict in favor of the plaintiff for the full amount of the claim. The important facts in the controversy may be stated as follows:

In April, 1907, Alexander Maslowski purchased the retail liquor business then licensed to one Dempsey for \$1,700, obtaining the necessary money from this plaintiff, to whom Maslowski and his wife executed the mortgage in suit for that amount payable one year after date. Simultaneously, Maslowski also executed to the plaintiff a note in the same amount payable four months after date, which note was not paid at maturity but a new note given, and thereafter until after the wife's death in series other notes were given to secure the same debt, each at four months, payable at the Deposit & Savings Bank of Kingston. None of the notes were paid, nor did Alexander Maslowski or his wife ever make any payment either on principal or interest.

Rosalie Maslowski, the wife, died October 3, 1914; her husband became administrator and in that capacity was the original defendant. He died December 28, 1917. Letters of administration were duly issued to his son, Peter A. Maslowski, and on November 13, 1918, he was substituted as defendant.

The case was tried before a jury on January 17, 1919, and

resulted in a verdict by direction of the Court in favor of the plaintiff. At that trial it was called to the attention of the Court that the affidavit required by the Act of July 9, 1901, Section 1, Tenth, P. L. 617, as amended by the Act of April 23, 1903, P. L. 261, had not been filed with the praecipe, whereby the record did not show, according to the requirements of the Act, who are the real owners of the land to be charged. Because of this omission the plaintiff on January 17, 1919, made an application for a rule to show cause why this affidavit should not be filed *nunc pro tunc*; and the defendant on January 21, 1919, moved for judgment *n. o. v.*, and for other reasons moved for a new trial.

Both applications in due time were argued before the Court *en banc*, and disposed of on March 17, 1919, by a short opinion as follows: "We are this day making absolute the rule for new trial, and at the same time allowing the plaintiff *nunc pro tunc* to file the affidavit required by the Act of 1901, setting out the names of the owners of the land. King *v.* Grannis, 291, Superior, 361."

The plaintiff on March 19, 1919, obtained a rule upon the persons named in the affidavit "as the owners of the land encumbered, to-wit, the heirs of Rosalie Maslowski, to appear and plead to said action, etc. This, on failure of defendants to appear, resulted in order to prothonotary to enter plea of *non assumpsit*, etc.

On the same day an appearance was entered of record in the following form: "Rush Trescott, d. b. e. for defendants, summoned by rule as owners March 29, 1919."

On May 8, 1919, the case was again called for trial before a jury, and again we gave binding instructions in favor of the plaintiff for the full amount of the claim.

The defendants again moved for a new trial, and for judgment *n. o. v.*, and have presented several propositions in support of these motions:

1. That no judgment can be entered in this case against the heirs of Rosalie Maslowski because the Court had no power to permit the filing of the affidavit required by Section 10 of the Act of 1901, P. L. 614, *nunc pro tunc*, which is equivalent to extending the time for filing the same.

Singer *v.* D., L. & W. R. R. Co., 254 Pa. 502, is cited in support of this, and it is argued in the words of that decision: "The commands of a statute cannot be waived or dispensed with by the Court. They require implicit obedience as well from the Court as from its suitor. When a statute fixes the time within which an act must be done, the Courts have no power to enlarge it, although it relates to a mere question of practice."

But in that case the plaintiff had allowed the statutory period for an appeal from an assessment of damages by viewers in eminent domain proceedings to elapse, and the rights of the other party to have the report stand as a final judgment had conclusively

arisen. It is different here. The filing of the affidavit is purely procedural. Failure to file it might halt the plaintiff until it was filed and until, after that, proper parties were brought upon the record and into court. As was said in *King v. Grannis*, 29 Superior, 367, where the affidavit was allowed to be filed *nunc pro tunc*: "The Act of Assembly as stated in the seventeenth clause was intended to furnish a complete and exclusive system in itself, relative to the service of certain process in actions at law, but fails to impose any penalty for not following the direction, as set out in the tenth clause, in regard to practice. The purpose was to make the real owner and claimant of the property, and not a mere tenant or trespasser, the defendant in the action; but, the omission to file the required affidavit would not necessarily abate the action. The Court in its discretion was justified in allowing the affidavit to be filed subsequently, as the defendants, as then in court, having been served with the process while in possession of the premises, did not disclose any other parties in interest."

The real question here seems to us to be whether an alias *sci. fa.* was indispensable to hale parties named in the affidavit into court, or whether it might be done by amendment, adding new defendants, and by a service of the rule upon them to appear and plead.

Has the Act of 1901, *supra*, superseded, in actions of ejectment or *scire facias*, the Act of May 4, 1852, Section 2, P. L. 574, permitting the addition of names of defendants "whenever it shall appear that a mistake or omission has been made in the name of any such party?" We think not. As the error in not filing the affidavit does not abate the action (*King v. Grannis, supra*) it may be corrected by amendment and the omitted parties may be summoned into court by service of the rule to appear and plead. We think that such a practice is entirely justified by *Leonard v. Parker*, 72 Pa. 268: "When the name is added if without previous notice or appearance to the rule, of course the party must be brought into court by an alias summons, or perhaps by a rule to appear and plead."

The suggestion (per Thompson, C. J.) that this might be done by a rule to appear and plead, comes from so high an authority that no practitioner ought to hesitate in following it. In every respect such practice is in the interests of simplicity and justice without mere subservience to consideration for useless technicalities.

But there is still another reason why the appearance of these defendants should be regarded as sufficient to carry the litigation to its finality after a jury was sworn.

On March 29, 1919, that appearance was made *de bene esse*, that is to say, on condition that service be found sufficient.

In *McCullough v. Railway Ass'n*, 225 Pa. 118, the effect of such an appearance *d. b. e.* is fully discussed. Its purpose is to enable a defendant to question the jurisdiction without submit-

ting to it, and it raises the preliminary question of jurisdiction. "If the decision of the Court is favorable to the defendant, he is not in court or subject to its jurisdiction, and the merits of the case cannot be inquired into. If, on the other hand, the Court rules the preliminary question against the defendant, he has one of two courses to pursue. He may rely upon the position he has taken and attempt to sustain it by appeal to the proper appellate court; or he may consider himself in court and defend the action on its merits. He is required to select one of the two courses, and having done so, he must accept the legal consequences of his action."

This means that the defendants should have promptly moved to strike off the service of the rule, and, perhaps, the plea which the Court entered on March 29, and if the motion were refused, should have taken an exception and appealed to the higher court on the jurisdictional question. No such motion having been made it was too late to raise the question as it was raised in this case after the jury was sworn on the trial by objection to the admission of "any and all evidence in this case, for the reason that at the time the *scire facias* was issued, no affidavit was filed as required by Section 10 of the Act of 1901, P. L. 614;" and at another stage of the trial by way of objection to evidence "for the reason that the procedure to bring in the defendants was irregular and void; they could only be made parties by issuing an alias summons served by the sheriff in the regular way."

2. That the mortgage which is here sought to be enforced was based upon an illegal transaction, and the Court will not lend its aid to the enforcement of the same.

It is argued that because under the License Law, Act of May 13, 1887, Section 5, Seventh, an applicant for a license must, in his application, state under oath that he is the only person in any manner pecuniarily interested in the business so asked to be licensed, and that no other person shall be in any manner pecuniarily interested therein during the continuance of the license; therefore a loan based in part upon a consideration that a mortgagor shall buy the mortgagee's beer exclusively, is an unlawful contract which the courts will not enforce by permitting recovery upon this mortgage, citing Barrett's License, 11 D. R. 649, in which a license was revoked, because it was shown by a written contract with a brewing company that its beer only should be sold in the place, such a contract being held as giving to the brewing company a pecuniary interest in the licensed place. We cannot accept that to be the law.

On its face this transaction was a loan secured by a mortgage. In defense it was offered to prove by Peter Maslowski, a son of the mortgagors, "that just prior to the execution of the mortgage, the plaintiff's secretary and agent said to Alexander Maslowski, one of the mortgagors 'we are making you this loan of

\$1,700 with the distinct understanding that you are to buy and sell Bartels beer exclusively; otherwise we wouldn't make you this loan.'"

It would be only by a strained construction of the liquor license law of 1887 that this mortgage could be held to be null and void upon such an allegation as is here presented. The borrowing of the money and the making of the mortgage constituted an entirely legal and separate transaction. An incidental promise to buy beer exclusively from the brewing company, notwithstanding it led the mortgagee to advance the money, would itself be null and void and as such unenforceable against the mortgagor, who could from the very outstart ignore and violate this illicit promise without laying himself liable to any action or penalty. But he cannot by his illicit, incidental, and collateral promise escape the payment of his just debt, because the law is, and has been many times so declared, that a demand connected with an illegal transaction can be enforced when the plaintiff requires no aid from the illegal transaction to establish his case; that, it was said in *Swain v. Scott*, 11 S. & R. 155, is the test. *National Bank v. First National Bank*, 226 Pa. 276; *Sauer v. McKees Rocks School District*, 243 Pa. 304. This plaintiff by putting in evidence the mortgage and proving that no payments were made thereon, would therefore be entitled to judgment, unless, by way of defense, payment or fraud inclined the scale otherwise. (See also *Horan v. Weiler*, 41 Pa. 470.)

3. That the plaintiff is not entitled to judgment in this case for the reason that he has another action pending in the Orphans' Court upon the same ground of action against the same parties, and the defendant is entitled to an abatement of this action.

For this proposition *Cleveland R. R. Co. v. Erie*, 27 Pa. 380, is cited: "That no man shall be twice harassed for the same cause. * * * Two suits for the same cause, even though brought in the same court, will never be tolerated. * * * If a party may carry on two suits against his adversary, he may carry on twenty as well, if he could find that many courts having jurisdiction."

We shall not elaborate the reasons why this proposition is inapplicable. The jurisdiction of the Common Pleas and of the Orphans' Court are not parallel jurisdictions. A party having a just claim upon which he has brought suit in the Common Pleas, may at the same time appear in the Orphans' Court and attempt to prove his claim without losing his right to proceed in the Common Pleas if the claim be contested. The Orphans' Court is necessarily the court for the distribution of the decedents' estates; first, to creditors and then if there be a residue, to devisees or heirs. When a creditor in the Orphans' Court finds himself confronted with a defense, it may be that the Orphans' Court will hold off until a jury may have settled the contested questions of fact in the Common Pleas.

In this very case the suit was begun on April 27, 1915. In June, 1915, the plaintiff appeared in the Orphans' Court and obtained citation on the administrator to show cause why the real estate should not be sold for the payment of debts. Among other defenses, it was set up in the Orphans' Court that the court had no jurisdiction because the action had been begun in the Common Pleas. The Orphans' Court on May 25, 1917, after a considerable contest, ordered the administrator to make application for the sale of the real estate, and thereupon the case was taken to the Supreme Court on behalf of the defendant estate by the administrator.

An examination of the pleadings in the Orphans' Court shows that one of the points raised by the administrator's answer there, was the pendency of this action in the Common Pleas; wherefore in said answer, as shown by the records of that court, as they were presented to the Supreme Court on appeal, the respondent prayed that the petition be dismissed on the ground that the proceedings "are within the jurisdiction of the Court of Common Pleas of Luzerne county, by the action, and upon the motion of, the said Bartels Brewing Company had and taken long prior to the presentation of their aforesaid petition upon which the said rule is granted, to-wit: * * * the *scire facias* aforesaid issued out of the Court of Common Pleas on April 27, 1915."

The Orphans Court having granted the petition and ordered the administrator to proceed to sell, such action was made the subject of exception and assignment of error in the Supreme Court, on the ground that the Orphans' Court should have sent the case to the Common Pleas upon a precept for the trial of an issue. (First assignment of error.)

The Supreme Court in disposing of the case held (by opinion of Chief Justice Brown) that the order of the Orphans' Court was merely interlocutory, and that the appeal must therefore be quashed.

"If a sale should be made in pursuance of the said order or decree, an appeal will lie from the final confirmation of it, and the errors now justly, but prematurely, complained of, will then be properly here for correction."

With such an intimation that a verdict of a jury upon the facts in dispute ought to be obtained before the proceeding in the Orphans' Court for the sale of the real estate shall be consummated, the plaintiff naturally, and, in our opinion, correctly, reverted to the action in the Common Pleas which had been begun, for a preliminary establishment of its rights before following up the proceeding to compel the sale of the land by the administrator. In any event, it seems clear enough that the remedies in Common Pleas and the Orphans' Court for the collection of the debt are intended to supplement each other and to run parallel with each

other. Proceedings in these two courts are not to be regarded as destructive of each other, as they would be if the courts had exactly similar jurisdiction over the subject matter.

4. That the surety was discharged from liability when the plaintiff after the maturity of the mortgage extended the time of payment for upwards of five years without the knowledge or consent of the surety.

In support of this proposition we are referred to *Miller v. Stem*, 12 Pa. 383, *Riddle v. Thompson*, 104 Pa. 330, and *Bauschard v. Casualty Co.*, 21 Superior, 370.

Assuming that Rosalie Maslowski became a surety for her husband, and that the mortgage was not a principal security for the debt which was contracted by a loan made to her husband and herself at the time, we cannot from the testimony in the case find that there has been any legal extension of time binding the plaintiff to abstain from suit upon this mortgage after the end of one year; and as we read the decisions, any extension of time or forbearance granted to the principal debtor, must have been sufficiently definite to prevent suit until the period of the extension had fully elapsed.

The facts as developed before us bring the case clearly within the principle as laid down in *Marberger v. Pott*, 16 Pa. 13, that a surety "is not discharged by mere forbearance to sue. It is necessary that he should do some act to warn the holder of the instrument and put him on his guard; such as giving him notice to proceed against the principal."

And *Weller's App.*, 103 Pa. 596, that "mere forbearance or delay will not release a surety. To be released he must demand proceedings with notice that he will not be bound if they are not instituted."

In the case before us the defendant relies upon the fact that simultaneously with the execution of the mortgage, a note was taken from the decedent's husband, payable four months after date, for the amounts of the loan, which note was renewed every four months during the lifetime of the decedent without any proof that these notes were intended to change the contract established by the mortgage. The giving of these notes brings the case within the principle of *Shaw v. The Church*, 39 Pa. 226: "Where a creditor takes from his debtor a note, payable at a future day on account of his claim, the law raises no implication that he agrees to give time until the maturity of the note for the payment of the original debt, but the agreement must be proved as a fact dependent upon the understanding of the parties at the time when the security is given."

And to the same effect is *Buck v. Wilson*, 113 Pa. 423; *Brewing Co. v. Rumbarger*, 181, Pa. 251.

5. That when a creditor has the means of satisfaction actually

and potentially in his hand or within his control and does not choose to retain it but relinquishes it, the surety is discharged.

This point is predicated upon the testimony of Peter Maslowski that as an additional security for the loan the plaintiff obtained from Alexander and from Peter a few months after this mortgage had been made, a bill of sale covering the personal property which Alexander had acquired from Dempsey, and also the personal property of Peter, consisting of the equipment of an undertaking establishment which Peter was conducting. Peter has described his father's property, included in the bill of sale, as "old furniture and the barroom fixtures and probably his stock of liquors," all of which he judged would be of a value "in the neighborhood of twelve to fifteen hundred dollars." His own property included in the bill of sale he has described as "four or five horses, two double rigs or coaches, all of the blankets and robes, harness, and also a good bit of my furniture." By pledging his own property Peter apparently intended to become a surety. The bill of sale was never followed by possession in the plaintiff. The property was left with Alexander and with Peter respectively. The stock of liquors was used in carrying on the business, and the barroom fixtures were in due time sold for Alexander's rent by the landlord.

After the purchase Alexander had promptly moved into the Dempsey place and carried on the business from 1907 to 1913 (see his testimony 61A, appellant's paper book), and with his wife and family occupied the place. There is no proof, as we have already intimated, that she ever demanded any proceeding to be taken by this plaintiff against her husband for the collection of the debt out of this personal property. After the fixtures had been sold for rent, the household furniture, which made up part of this bill of sale, was taken away by Peter and his father, each taking his own.

We can find no circumstances from the foregoing recital of facts which make the principle of law applicable to the case. The whole transaction seems to us to have been on the part of the Maslowski's, a family affair. The wife pledged her real estate as security for the original investment in a business which the husband, with her consent, undertook. That business failed, and after the wife's death the husband set up this defense, as a result of which the wife's property, subject to any other debts against her, might be saved to him or to his children. He having died, this defense is now carried on by the administrator of her and of his estate and by their children and heirs, with possible consequence of giving them an inheritance discharged from a debt to payment of which it had been pledged by the parents.

Rules for new trial and for judgment *n. o. v.* are discharged.

John McGahren, for plaintiff.

Rush Trescott, J. P. Lord, for defendants.

DRUM *et al.* v. DINKELACKER.*Injunction—Equity jurisdiction—Dispute of title—Issue.*

Where after bill for injunction to prevent maintenance of garage on alley-way between two properties and where plaintiff's evidence shows common use for over thirty years, and after granting of injunction, and denial of motion to dissolve, there is found substantial dispute of fact as to the right of way averred in plaintiff's bill, application of defendant for certification to law side is not too late, and bill will be retained by chancellor until issue shall have been tried at law on question of existence of right of way for twenty-one years before filing of bill.

Preliminary adjudication after final hearing. Common Pleas, Luzerne county. In Equity. No. 2, June term, 1916.

FINDINGS OF FACT.

STRAUSS, J., July 28, 1919.—1. On May 10, 1916, this bill was filed averring the ownership of a certain lot of land in the village of Drums, township of Butler, in this county, and that on the southwesterly side of said lot there had been an alley part of which was owned by the plaintiffs and part by the owners of the lot on the opposite or westerly side of the alley which alley had been used in common by the plaintiffs and their predecessors in the title with the owners of the lot on the opposite side of the alley for a period of over thirty years, and that the defendant without license or warrant on or about January 12, 1916, moved and placed a garage building on said alley occupying the entire width thereof seventy-five feet from the public road thereby closing the same; and that he also obstructed the alley by placing lumber, ashes and other material thereon in such manner as to prevent the plaintiffs from using the same as they had the right to do. Wherefore the plaintiffs prayed that an injunction might be issued restraining the defendant from any further encroachment and from obstructing the said alley, and mandatory to direct the defendant to move his garage building and also all lumber and other material from the alley.

2. A preliminary injunction was duly issued upon the filing of this bill.

3. On the day fixed, May 15, 1916, at the beginning of the hearing, the defendant caused to be filed (see docket entry, also stenographer's notes) a motion to dissolve the injunction for nine separate and distinct reasons, the ninth of which was as follows:

"The question at issue between the plaintiffs and the defendant

is a dispute relative to a land line of such a nature that equity is without jurisdiction, and the suit should have been brought in ejectment at law, and the defendant herein asks for an issue to try questions of fact, and requests that this suit be certified to the law side of the court under the Act of June 7, 1907, P. L. 400, in order that a jury may determine the facts in the case."

This motion was promptly denied by the Court. The stenographer's record reports the action of the defendant and of the Court as follows:

"Hearing to continue preliminary injunction. Before Hon. John M. Garman, May 15, 1916, at 10 a. m. * * *

"Defendant's Counsel: I want to file a motion to dissolve the injunction before testimony taken. I would like to have it marked filed.

"The Court: We will deny the motion. It may be marked filed.

"Defendant's Counsel: Your Honor will give us the benefit of an exception.

"The Court. You may draw up an exception and we will sign it."

The taking of testimony was then proceeded with and concluded on the same day. (See stenographer's record on preliminary hearing.)

4. We find in the files of the case the following order:

"Now, 15th May, 1916, motion to dissolve the injunction is denied. By the Court."

And this order is marked "Filed May 29, 1918," but no reference is made to it in the docket entry either under date of May 15, 1916, or as filed May 29, 1918. The only evidence that such an order was made is the paper in the files, and a recitation of the order in a formal notation by the Court of an exception and the sealing of a bill found on the docket under date May 27, 1918.

5. On May 24, 1916, the plaintiff's printed bill was filed and on June 6, 1916, the defendant's printed answer was filed, and this answer contained *inter alia*:

"15th. The defendant avers that a court of equity has no jurisdiction to dispose of the issues raised by the pleadings in this case, and avers that the suit should have been brought at law, and prays the Court to award an issue to try questions of fact, said issue to be decided *in limine* as provided by the Act of June 7,

1907, P. L. 440, and after hearing on said issue, certify the case to the law side of the court for proper action according to law."

No further action appears to have been taken in the case until March 4, 1918, when the defendant's attorney obtained an order permitting him to file a replication *nunc pro tunc*.

6. On May 7, 1918, the defendant filed another motion to dissolve the injunction because:

"(1) The injunction bond was without sufficient sureties; (2) the injunction having been granted on May 10, 1916, and returnable May 15, 1916, no order of Court was ever made extending and continuing the same; and (3) the complainant's bill having been filed and preliminary injunction issued on May 10, 1916, the plaintiff had failed to prosecute the same with the diligence required by law and equity."

May 22, 1918, plaintiff was permitted by order of Court to file a new bond with two sureties in order to overcome the objection that had been raised to the original bond, and by an order of May 27, 1918, the other objections to the motion to dissolve that had been filed May 7 were overruled and the motion was denied.

7. The substance of the docket entries beginning May 7, 1918, that are relevant to the question of jurisdiction in equity now being considered by us are as follows:

"May 7, 1918, motion to dissolve the injunction filed.

"May 27, 1918, this motion was denied.

"May 27, 1918, the entry of a formal decree (1) continuing the injunction; (2) mandatory in directing the removal of the garage, etc., and the restoration of the alley to its former condition within thirty days; (3) that the cost of removing the garage, etc., be paid by the defendant.

"May 31, 1918, a formal exception to the order of May 7 refusing to dissolve the injunction.

"May 31, 1918, a formal exception to a decree dated May 15, 1916, overruling the defendant's motion to dissolve the preliminary injunction and refusing to certify the case to the law side of the court.

"June 4, 1918, an entry which reads as follows: 'An oral order having been made at the preliminary hearing held in the above entitled case whereby the injunction was indefinitely continued pending a consideration of the case on motion of P. L. Drum and W. C. Price(attorneys for the plaintiff, it is now ordered and

decreed that such continuance be made as a matter of record *nunc pro tunc*. By the Court."

After this entry of June 4, 1918, the following entries appear:

"May 22, 1918, a new bond was approved and directed to be filed.

"May 31, 1918, exceptions to the decree of the Court of May 27, 1918, were duly entered.

"May 31, 1918, exceptions were duly entered for the defendant to the order of decree of May 15, 1916, as made and entered on May 27, 1918. (This seems to be a duplication of a similar entry noted above.)

"May 31, 1918, the Court certified that the value of the property involved exceeds \$1,500."

It is unnecessary to set out the subsequent portions of this docket entry, as they all relate to the appeal to the Supreme Court and the action of the Court as shown by the *remittitur* which was filed on November 7, 1918.

8. The defendant appealed to the Supreme Court and assigned as error that the Court erred in not certifying the case to the law side for trial by jury, the jurisdiction of the Court having been duly and regularly challenged *in limine* by the defendant according to the Act of 1907 (4th assignment of error). The Supreme Court, by the opinion of Mr. Justice Simpson, October 23, 1918, made the following comments, *inter alia*:

"The record fails to disclose that the Court below was asked either at the hearing or at any other time to certify the case to the law side, or that the case was ever put down for a decision of that question *in limine*. * * * The fourth assignment alleges error in not certifying the case to the law side of the Court, but the Court was never moved to so certify it, and if it had been and had refused the motion the decision would have been interlocutory and not the subject of an appeal."

9. The Supreme Court reversed the decision of the lower Court in so far as that Court decreed a mandatory preliminary injunction "instead of maintaining until final hearing the status which existed at the time when the bill was filed. It wholly destroyed that status. Moreover, on a motion to dissolve an injunction with no outstanding motion to enlarge it, the duty of the Court is either to dissolve or maintain it, or to modify it by making it less stringent. It cannot enlarge the decree for the

defendant was not in court to meet that question. Much less can it finally conclude the controversy. That is a matter for final hearing only."

10. When the case was called for trial upon final hearing on January 8, 1919, the defendant's attorney, before any other action had been taken, requested the Court to determine the question of jurisdiction *in limine* before hearing upon the general merits, and filed a paper which was transcribed at length upon the stenographer's record. We took no action at that time and permitted the testimony to be taken, intending to consider the jurisdictional question *in limine* as the statute requires after the evidence had been fully taken, and accordingly we now proceed to do so.

11. The plaintiffs contend that the application to certify to the law side comes too late.

12. The foregoing findings of fact have been formally made with special reference only to the right of the defendant to have the question of jurisdiction decided now upon a motion submitted at the final hearing but before the evidence at that hearing was taken.

DISCUSSION.

The bill filed May 10, 1916, and the answer filed June 6, 1916, plainly raise an issue of fact as to an alley right asserted by the plaintiff and as to the defendant's title in the land free from such alley right asserted by the defendant. When the bill was filed the defendant was admittedly in exclusive possession of a portion of the land, he having completely erected, and being then in occupancy of, a garage thereon. This being the condition of things as shown by the pleadings, the case presented all the appearance of an ejectment bill.

The stenographer's record of the preliminary hearing discloses that the only evidence produced, and the only witnesses called, were on behalf of the plaintiff; that defendant relied upon his legal position and presented no proof in support of the facts as afterwards set out in the answer.

In Holden *v.* Llewellyn, 262 Pa. 400, we had before us a similar question as to a defendant's right to have a case certified to the law side. By opinion filed May 27, 1918, we held, as a result of examination of cases decided since the Act of 1907, that there may be two classes of cases within the purview of the statute:

(1) where on the face of the bill, or of the bill and answer, by inspection alone it becomes clear that there is no jurisdiction (*Musselman v. Myers*, 240 Pa. 5; *Miles v. Penn'a Coal Co.*, 231 Pa. 155; *Goss v. Spencer* 245 Pa. 12); and (2) where, notwithstanding the sufficiency of these pleadings, the evidence develops facts inconsistent with jurisdiction.

An instance within the first class is furnished by *Platzck v. Sparks*, 14 Luzerne, 271, where the late Judge Ferris stated:

"While there may be cases in which evidence might be needed to settle the jurisdictional question, we do not think this is one of them. Here the issue is quite apparent from the pleadings. The plaintiffs assert a right to exclude the defendant from a particular portion of their land and asked the Court to do it by injunction. The defendant denies the existence of the right upon which is predicated plaintiff's claim to the relief sought. The effect of the bill and answer, which is confirmed by the replication, is to show that the case turns upon a disputed legal title to a right of way."

In *Holden v. Llewellyn*, *supra*, the dispute arose upon certain averments of fact concerning the title. We there adopted the practice of hearing evidence in order that we might arrive at the truth or at least at the *prima facies* of the rights claimed by each of the parties. The plaintiff having proved such a *prima facie* right in himself, the defendant declined to produce any countervailing evidence, but relied solely on the technical issue made by the bill and responsive answer as furnishing a secure foundation for certification under the statute. We declined to take that view, but held that the plaintiff had sufficiently established his right to have the *status quo* preserved by injunction. On appeal the Supreme Court affirmed our action in granting and continuing the preliminary injunction, but as that Court held a refusal to certify the case to the law side to be only interlocutory and not the subject of appeal, the exact question of practice now under consideration was left undecided. Nearly two years earlier, in the case now at bar, our colleague, Judge Garman, had adopted, as we have already pointed out, the same practice. We find in his opinion the following:

"In consideration of this case, we are, because of lack of evidence on the part of the defendant, obliged to conclude that the plaintiff had a right of way or alley from the public road to the rear of the defendant's lot, partly on plaintiff's land and partly on

defendant's land, the right of way being designated as an alley. We are forced to this conclusion by the uncontradicted evidence thereof on the part of the plaintiffs. There was no evidence to contradict the testimony on the part of the plaintiffs, and we therefore find that there was an alley as averred in the plaintiff's bill."

It seems to us, therefore, that this practice ought to be adhered to in this court until it shall have been invalidated by higher authority.

The plaintiff, however, contends that the application to certify to the law side is too late, and to sustain that position relies upon the statement found in the opinion of Mr. Justice Simpson as set out in our eighth finding of fact; and we have no doubt that it would be reasonable to hold the application to certify to the law side as being too late if it were a fact that "the Court below was not asked either at the hearing or at any other time to certify the case to the law side." It is true that the docket entry, and consequently the certificate thereof as transmitted on appeal to the Supreme Court, does not contain any reference specifically showing an application to have the case certified.

As shown in finding three, on May 15, 1916, the day set for hearing the motion to continue the injunction, the defendant appeared, filed a paper on the basis of which he moved to dissolve the injunction, and set out in this paper nine separate and distinct reasons, the ninth of which contained the express request "for an issue to try the facts, and that the case be certified to the law side of the court under the Act of June 7, 1907."

It is highly improbable that Justice Simpson would have stated in his opinion that the record "fails to disclose that the Court below was asked to certify the case to the law side," if attention had been called at the argument, or in the appellant's paper book, to the fact that the docket entry which reads: "Now, May 15, 1916, motion to dissolve the injunction filed," had reference to a paper which contained this request, or that the answer filed by this defendant on June 10, 1916, which was before the court in May, 1918, when the final order continuing the injunction was made, contained in its fifteenth paragraph an averment that the court is without equity jurisdiction, that the suit should have been brought at law, and a prayer that the Court award an issue to try questions of fact *in limine*, and after hearing on such issue certify the case to the law side for proper action according to law.

The opinion of Judge Garman clearly shows that he had under consideration the question of jurisdiction and practically that question only; that if evidence had been submitted to him against "the existence of the way," and that if the matter were doubtful,

"the chancellor would hold until the right could be determined at law."

The fact, therefore, as it has been developed before us on this final hearing, is that the defendant at every stage of the case had objected to the jurisdiction and requested a certification to the law side. He did this on the motion to dissolve filed May 15, 1916, and again in the answer filed June 6, 1916. The question was fairly considered by the Court before the preliminary injunction was continued in May, 1918, and was presented to the Supreme Court in *Drum v. Dinkelacker*, 262 Pa. 392.

The refusal to certify not being appealable but interlocutory only, the question of jurisdiction must be disposed of at this final hearing.

Here the defendant has presented evidence which, if believed, would establish the non-existence of this alley. It has many times been decided that under such conditions equity has no jurisdiction until the right shall have been established at law. *Rhea v. Forsyth*, 37 Pa. 503; *King v. McCully*, 38 Pa. 76; *Codino v. Kane*, 26 Sup. Ct. 596; *Coward v. Llewellyn*, 209 Pa. 582; *Scanlin v. Conshohocken*, 209 Pa. 48; *O'Neil v. McKeesport*, 201 Pa. 386.

We have therefore arrived at the following

CONCLUSIONS OF LAW:

1. There is a substantial dispute of fact sustained by evidence on both sides as to whether the right of way averred in the plaintiff's bill existed.

2. The application contained in the answer that the case be certified to the law side, is not too late.

3. The bill should therefore be retained by this court in equity (or as the precedents declare by the chancellor) until an issue shall have been tried at law upon the question: Has there existed during a period of more than twenty-one years before the filing of the bill a right of way, as described in the bill, in favor of the plaintiffs and their predecessors in the title over the lands of the defendant?

4. Accordingly we must withhold findings of fact and law on the merits of the dispute until a jury shall have answered that question.

Case certified to the law side of the court, and the following question or issue shall be submitted to a jury, viz.:

Has there existed during a period of more than twenty-one years before the filing of the bill a right of way, as described in the bill, in favor of the plaintiffs and their predecessors in the title over the lands of the defendant?

In that issue these plaintiffs shall have the affirmative and the bill shall stand as declaration, the answer as plea.

W. C. Price, F. L. Drum, for plaintiffs.

Roger Dever, Rush Trescott, for defendant.

Court of Common Pleas of Columbia County.**BORO. OF BERWICK *v.* SPONSLER *et al.***

Municipalities—Boroughs—Increase of debt—Street improvements—Bond issue—Two-thirds tax on abutting owners.

1. Where as result of election a borough increases its debt and issues bonds in series for street improvements, and thereafter adds two-thirds cost of improvements on abutting property owners, but proceeds of assessment and liens is to be applied to the sinking fund for payment of series A of bonds, and excess, if any, to be applied to payment of bonds, series B, the property owners are protected by thus getting the benefit of every dollar they pay, and there is no double tax. *A fortiori*, since borough cannot collect an annual tax provided to be laid to redeem the bonds, after the tax and assessments equal the amount of said tax.
2. Because question submitted to electors called for approval or disapproval of increase of debt, fund to be used "solely for the purpose" of street improvements, borough is not thereby precluded from assessing part of improvement costs on the abutting owners, and election could not because of representation *supra* be called "false and fraudulent."

Scire facias sur municipal claim. Re motion for judgment for want of sufficient affidavit of defense. Common Pleas, Columbia county. No. 39, December term, 1918.

HARMON, J., December , 1919.—This is a motion for judgment for want of sufficient affidavit of defense filed to the *scire facias* issued on the municipal claim above referred to, George E. Sponsler, original defendant, against whom the claim was filed, has filed his separate affidavit of defense, and the other defendants being *terre tenants*, having purchased lots covered by the claim as filed, have filed their joint affidavits of defense. Plaintiff has moved for judgment for want of sufficiency of these affidavits, which is the question now before us. These affidavits are identical in form, save in one particular noted in sub-division "O" of the second paragraph thereof, to which we think we should refer at this time, wherein the election for the increase of the indebtedness of the plaintiff borough for the payment of the original cost of expense of the paving the streets in question is alleged to be "false and fraudulent", in that the electors who voted for the said increase did so solely because of the representations contained in the ordinance and notice of said election, that the street paving was to be paid for solely out of the proceeds of said bonds. The affidavits differ at this point, in that Sponsler, non-resident of Berwick, does not claim to be one of the persons who voted for said increase of indebtedness on the representation alleged, while the other defendants claim that they were amongst those who voted on that understanding. These affidavits

of defense contain the following admission at the beginning of paragraph one:

"The defendant admits the facts as alleged in the municipal claim, filed October 31, 1918, on which the above *scire facias* has issued;"

It then proceeds: "but avers that the assessment of a portion of the expense of curbing, paving and grading the streets mentioned in said claim, upon abutting property owners, and the filing of municipal claims for such assessments; and the issuing of writs of *scire facias* for the collection thereof, was improper, illegal and without authority in law; and that the authorities of the borough of Berwick had and have no legal right or authority to collect any portion of the expense of paving, grading and curbing said streets from the abutting property owners, of whom the defendant is one."

Paragraph two of the affidavit then proceeds in the fifteen several sub-divisions thereof to elaborate and go into detail upon the general allegation of no legal right or authority of the borough in the premises to file and collect the liens as referred to in the first paragraph. The substance of the entire defense raised in the second paragraph is to be found in sub-division "O" thereof as follows:

"That the defendant is advised and believes that the action of the said borough and the borough council in undertaking to assess two-thirds of the expense of the street improvements aforesaid upon abutting property owners, after having obtained the assent of the electors to an issue of the bonds for that purpose; and the action of the borough and its council in appropriating said assessments and claims to the sinking fund provided for the payment of said bonds, after having levied an annual tax providing for sinking fund entirely sufficient for that purpose, is unlawful, unwarranted and beyond the power and authority of the said borough or its officers in the premises; that it will create a fund of at least \$32,000.00 over and above any sum required to pay for the paving and curbing aforesaid, etc.," * * *

In order to clarify the question, if possible, and to get at the exact theory of the defense in this case as raised in those affidavits, we requested counsel for the defendant to furnish us a statement of the question involved, which in a paper filed with us they have stated to be as follows:

"After proclaiming a special election and obtaining the assent of voters to an increase of borough indebtedness, and an issue and sale of bonds, for the sole purpose of paying the expenses of paving certain streets; and after levying a general tax on all borough property sufficient to procure a fund ample for the redemption of the bonds, interest and tax, as they mature; can the borough then lawfully ordain the making of assessments, on abutting

property owners, for two-thirds of the same expense, and appropriate the proceeds of such assessments and claims to the sinking fund?

"Is it not a breach of faith to so clearly ignore what the authorities gave the electors to understand was the purpose prior to obtaining the assent of the electors?"

Counsel for the plaintiff also furnished us with their view of the question involved, as follows:

"Are paving liens uncollectable because the financing of the improvement by a borough made it necessary in the first instance to increase the indebtedness beyond 2 per cent. with the assent of the electors?

"Is it necessary to submit to the voters the question of the assessment of the owners of property abutting on a municipal improvement?"

Before discussing the feature of the defense, as suggested in the statement of question involved as above quoted, we think attention should be paid to what we regard as a very material admission at the beginning of the first paragraph of the affidavits, *viz* : "The defendant admits the facts as alleged in the municipal claim, filed October 31, 1918, on which the above *scire facias* has issued." We think that in the face of this admission this case might very properly end at this point and judgment be entered for the plaintiffs. We think that admission precludes the defendants and they cannot defend on any question not raised in the averments of the claim itself. This claim was filed under the provisions of the Act of June 4, 1901, P. L. 364. Section 20 thereof provides:

"Tax claims shall be *prima facie* evidence of the fact averred therein in all cases; and the averments in both tax and municipal claims shall be conclusive evidence of the fact averred therein except in the particulars in which these averments shall be specially denied by the affidavit of defense, or any amendment thereof duly allowed."

The admission in the affidavit above referred to, therefore, covers the parties to the proceedings, and admits the ownership of the land against which the claims filed, admits the accuracy of the description and that the work was done by virtue of the general borough Act governing boroughs, *to-wit*: Act of May 4, 1915, P. L. 315, that the work was done under an ordinance of the borough of West Berwick (now the borough of Berwick by consolidation) passed and approved February 5, 1917. It admits that the lien was filed in time, that the assessment was properly made and admits the kind and character of work done as specified in the claim, that all notices required by law or ordinance were duly given to the owner or reputed owner, admits the amounts of the assessments for grading, paving and curbing, the

amount of the interest and cost as itemized and totalled, and that the assessments bear interest from September 13, 1918 until paid. A municipal claim filed which contains an averment of all these matters required by the statute serves as a statement and the averments are made conclusive evidence by the Act of 1901 of the facts averred therein, except in the particulars in which these averments may be specially denied by affidavits of defense. It would seem to follow, therefore, that only such defenses may be made to that statement of claim as the Legislature has provided. Authority for this is to be found in *Scranton v. Jermyn*, 156 Pa. 107. In that case there was a rule for judgment for want of sufficient affidavit of defense in a *scire facias sur* municipal claim for paving. * * *

The improvement in that case was made under the Act of May 23, 1889, P. L. 288, and by Art. 15, Sec. 26, of the same Act, P. L. 325, where the paving had been petitioned for "the passage by council of any ordinance directing the paving shall be held to be conclusive of the fact" that the necessary majority of owners have petitioned for it. The Court said: "Under these provisions of the statute the only defense upon this point open to a property holder against a municipal claim for paving is that there was no petition."

It was further contended by counsel that the provision of said Act, Art. 15, Sec. 22, P. L. 324, that claims shall be *prima facie* evidence of the amount thereof, and of the same being due and owing and of all matters therein set forth" could not be extended to cover matters of this kind concerning the manner in which the ordinance has been passed. The Court, Mr. Justice Mitchell, said: "The appellant's argument on the whole of this branch of the case overlooks the vital fact that claims for paving and other municipal improvements are a species of taxation, and the property owner has only such rights of contest and defense as the Legislature chooses to allow him."

The rule for judgment for want of sufficient affidavit of defense was made absolute.

In *Summerset Borough v. Sweitzer*, 54 Superior, 287, a *scire facias* issued upon a municipal claim covering two-thirds of the cost of the improvement along certain property. The Court said: "The claim conformed to the requirements of the Act of June 4, 1901, and Section 20 of that statute makes it evidence of the facts thus necessarily averred, etc.

"To the same effect also see *Allentown to use v. Ackerman*, 37 Superior, 363."

However, should we be in error in our conclusion above mentioned, let us proceed to examine the defense presented in paragraph 2 of these affidavits. Boiled down, this defense is, that because the borough held an election to increase the debt for the purpose of paying the cost of paving, etc., of the streets specified,

and stated on the ballot the sole purpose of the increase to be for the paying of the cost of paving, and then by ordinance provided for the assessment of two-thirds of the costs on the abutting owners, and at the same time laid an annual tax sufficient to redeem all the bonds issued following the authority to increase the debt, it cannot now collect these claims, because defendants would not have voted for the increase if they had known two-thirds of the cost would be assessed against the abutting owners, and because the borough will be collecting the amount of series A of the bonds by assessment and will also collect the amount thereof, \$32,000.00, from the annual tax. As to this last contention, that is, that of raising \$32,000.00 from annual tax over and above any sum required for the payment of said bonds, counsel have overlooked the fact that any attempt by the borough authorities to collect any such excess sum for the purpose stated from taxation, should these paving claims be paid, could be restrained and in connection therewith they have overlooked the provisions of Section 4 or ordinance 72, page 26, of defendants' exhibit "C", in the affidavit of defense, where it is expressly provided:

"And the proceeds of all assessments and liens to be filed for the grading, paving and curbing of streets specified in the questions submitted to the voters of West Berwick on November 7, 1916, are hereby specifically appropriated to the sinking fund for the payment of series "A" of the above bonds, and any excess shall be applied to the series "B", together with interest and State tax thereon as the same shall severally become due, etc."

Here is absolute protection to these defendants. Should they pay any of the annual tax provided for the redemption of series A of bonds and then pay these assessments, and together these payments should more than redeem series A, the excess is to be applied to series B, and the amount of series B is thereby reduced to that extent and will be the sooner paid off by the succeeding annual tax. In the end the defendants get the direct benefit of every dollar they pay. There is no double taxation (see *Huidekoper v. Meadville*, 83 Pa. 156) and in no event can the borough continue to collect the annual tax provided to be laid to redeem all bonds after the tax and these assessments paid in equal the amount of the bonds. The borough does not have to go on collecting the annual tax once the bonds are paid off, as it is contended merely because it directed in the ordinance for the laying and collecting of it. See *Dillon on Municipal Corporation*, Vol. I, page 422.

Should it attempt it, which is unthinkable, an adequate remedy exists. The contention of the defendants in this respect cannot be sustained.

This view leaves us to examine the remaining feature of the defense, viz.: Because the borough following the election at which the increase of debt was authorized, issued bonds to pay for the

improvements and then assessed two-thirds of the costs on the abutting owners of the streets paved, can the defendants escape liability for payment of this claim, because had they known that two-thirds of the cost was to be so assessed they would not have voted for the increase of debt? In other words, simply because the question submitted at the election called for approval or disapproval of the increases, the funds to be used for the sole purpose of paving the streets mentioned, was the borough thereby precluded from assessing part of the costs to the abutting owners, and was the election authorizing such increase "false and fraudulent because of misrepresentation of purpose?" Can the defendants here raise that question? We think the borough authorities had the legal right, power and authority to make this improvement and to provide in the first instance the funds to pay therefor in the manner they did, and that by so doing they were not precluded from assessing two-thirds of the cost on abutting owners along the streets paved and appropriate the funds arising from the assessments to the payment of the bonds. Authority for this is to be found in the borough code of 1915, P. L. , Chapter 6, Article 7, Section 1. In *Anderson v. Lower Merion Township*, 217 Pa. 369, it was held that a township of the first class could create sewer districts, put in sewers and pay therefor out of the funds of the township raised following an election for increase of debt, and then assess and apportion the cost of the improvement on abutting property owners under authority given by subsequent legislation. In this case ample legislation already existed for assessing part of the cost. In fact, had the borough authorities been so inclined they could have assessed the entire cost upon the abutting owners under the provisions of the borough code above referred to.

As to the allegation being "false and fraudulent" it is to be noted that the affidavit of defense does not challenge the election authorizing the increase in any particular, save that it claims that it was "false and fraudulent" simply because "of the representations contained in the ordinance and notice of election, that the street paving aforesaid was to be paid for solely out of the proceeds of said bonds, and that defendants and others would not have done so had they known in point of fact two-thirds of the cost was to be paid by assessment on abutting property owners." It is not charged there was any misapplication of the funds raised by sale of bonds following the issue admittedly authorized by a majority of the electors at the election, but counsel for defendant weaved their arguments around their own construction of the working of the ordinance and notice of election as to purpose, etc. They claim that the representation in the ordinance, etc., was that the street paving was to be paid for "solely" out of the proceeds of said funds. The argument falls in the face of the wording of the ordinance and notice of election as to purpose,

defendants' exhibit , and defendants admit in paragraph 2, Section B, of the affidavit, that in the ordinance expressing and signifying the desire of the authorities to increase the debt of the borough "it was expressly stated that it was the desire of the corporate authorities to increase the indebtedness of the said borough and to use the funds raised by the issue and sale of bonds for the sole purpose of grading, paving, etc.," of the streets mentioned. Section 3, paragraph 2, of the affidavit admits: "That in pursuance of said ordinance, and after due notice given and published according to law, a public election was held at the regular polling places in said borough on November 7, 1916, for the purpose of obtaining the assent of the electors of the said borough to the increase of indebtedness aforesaid, for the purposes aforesaid; at which election a majority of the electors of the borough voted in favor of the increase of debt as aforesaid."

The wording of the ordinance and notice of purpose of increase of debt as appears from the instruments themselves, and as admitted by the defendants, will not, and in our judgment, cannot possibly permit of the construction or interpretation put upon them by defendants, viz.: That the cost of the paving was to be paid for solely and only out of the proceeds of sale of the bonds and that the borough in stating the object to be "for the sole purpose of paying, etc.,," thereby represented to the voters that it would not attempt to raise any funds by assessment and repay or pay the bonds, or any part thereof, out of assessments on the property of those directly benefited. There was no such promise either express or implied in the ordinance or notice of purpose of election.

But in any event can the defendants in this particular issue raise any such question by way of defense as to the motive, etc., which prompted them to vote for the increase of debt? If offered on trial, would such defense be competent, relevant or material? We think not. Even were the question raised in an action directly attacking the legality of the election and the validity of the bonds on this ground, it could not prevail. Much less, then, can it prevail in a proceeding to collect a paving claim on a *sci. fa. sur* lien. In Millvale Borough, 162 Pa. 274, a bill in equity sought to restrain and declare illegal an issue of \$80,000 of bonds following an authorized increase of debt by election on the ground, *inter alia*: "Because the voters were induced to vote in favor of the increase of indebtedness by a desire to obtain an improvement of streets which was placed as the first object and held out the main purpose." The Court below held: "We do not think it is the proper subject of inquiry."

On appeal, the Supreme Court said: "In regard to the question that the voters were induced to vote in favor of the increase by means of misrepresentations, it is obvious that the judiciary department of the government cannot go into such an inquiry. The voters are responsible for their votes and are necessarily sup-

posed to inform themselves as to the reasons and motives for the votes which they decide to cast. To institute an inquiry for such reasons and motives in each individual case would be a work of impossible performance, and of no value if accomplished. The actual vote cast is the only test of the action of the body of voters."

In *Barr v. Philadelphia*, 191 Pa. 438, it was held: "That it was not the intention (from the language of the constitution and Act of 1891) that the electors should determine the purposes to which the money is to be applied. The electors are given notice of the purpose to which the corporate authorities intend to apply them, the ballots are so worded that electors vote for an increase of the debt and a brief description of the purpose is intended for their information so that they may vote upon the question intelligently."

In *Roof v. Mayor, etc., of the Town of Calhoun*, 117 Georgia, 263, it was held: "It is contended that the bonds should not have been validated because at least thirty-two negroes who voted in favor of the issuance of bonds were induced to do so by false and fraudulent statements made to them by officers of the town and others. This is not ground for refusing to validate the bonds. The courts cannot inquire into the motives prompting persons to vote on questions of this character where the voter freely and voluntarily exercises his right."

If, therefore, the question of motive which induces an elector to vote for or against an increase of debt is not a proper subject of inquiry by the judiciary in a direct attack upon the validity of the issue of bonds following such authorized increase of debt, much less could we consider it as a defense to a *sci. fa.* to collect a municipal claim for paving.

As noted above, George E. Sponsler, one of these defendants, the original owner against whom this paving claim was filed, was not a resident of Berwick and did not participate in the election resulting in the authorization of increase of debt. In view of that fact we doubt whether he has any standing at all to question the election, and as the other defendants who claim to have participated in the election all purchased their land subject to this original lien against Sponsler, we doubt whether they have any higher right of defense in this respect than the original defendant. However, we do not decide the case on that question.

We also consider Act No. 70, approved July 30, 1919, and Act 99, approved June 4, 1919, as passed by the Legislature of Pennsylvania, as applicable to this case. Both are Acts validating municipal claims for improvements as filed in this case and seem to remove all objections to such claims as here urged.

We are of the opinion that the affidavits raise no valid or legal defense to this claim.

Rule for judgment for want of sufficient affidavit of defense is made absolute.

Court of Quarter Sessions of Luzerne County.**COMMONWEALTH *v.* CORSINO.**

Criminal law—Homicide—Remarks of counsel creating prejudice—New trial.

Where in homicide trial, in summing up for Commonwealth, repeated reference is made to defendant in a manner to create impression of race prejudice and exhortation for first degree verdict and "no more compromise verdicts", there is ground for new trial on the ground of prejudice, even if no objection for defense is offered at the time, and where, though complaint is made to trial judge after adjournment, with suggestion from the latter to have the objectionable matter reduced to record, through inexperience of defendant's counsel no action was taken before verdict.

Motion for new trial. Quarter Sessions, Luzerne county. No. 79, April Sessions, 1917.

STRAUSS, J., July 1, 1919.—Upon the argument of this motion before the Court *en banc* among the reasons assigned was one based upon the district attorney's final argument. It was alleged, and has been sustained by deposition of a witness, that the district attorney then said to the jury: "Are you going to put a premium on another Sicilian affair? Are you going to find another compromise verdict in Luzerne county? Its about time that you find a first degree verdict." This occurred shortly before the noon adjournment which interrupted the district attorney's argument.

At the time Mr. Gillespie (the defendant's senior counsel) was absent. Mr. Pinola, his associate, immediately went in search of him, and, not finding him, returned to the court room just as adjournment was taken, came to the bench, privately complained to the trial judge of the district attorney's line of argument, and inquired what he (Pinola) ought to do. He was told that he ought to take steps to have the objectionable matter reduced to the record.

The district attorney's attention was not then called to the complaint; when court reconvened he completed his argument without interruption or action of any kind looking toward basing a motion for new trial upon his remarks. Repeatedly, both in the forenoon and in the afternoon, the district attorney referred to the defendant as a "Sicilian gunman".

The objectionable remarks were made with a degree of force that at once impressed the trial judge as unfortunate, causing him to put upon his notes as memoranda for the charge catch words from the district attorney's speech as a basis for special instruction to the jury, that defendant was not to be convicted on any supposed public policy requiring a verdict of murder in the first degree, nor upon any consideration of his nationality, but was to be judged solely by the evidence in the case.

At the argument the judges were unanimously of the opinion that the remarks complained of were calculated to injure the defendant. But it is argued that the defendant cannot now be permitted to complain because he took no action before the verdict.

In view of the complaint that was promptly made to the Court by Mr. Pinola, as already explained, and of the importance given to the fallacious argument by the Court in its charge, it now seems to us that when Mr. Pinola complained we should have been more explicit in advising him as to the course he ought to have pursued and that we ought to have notified the district attorney then and there and should have made some order for the defendant's protection.

We are aware that under the authorities if we refuse to permit this reason for new trial to prevail our judgment will probably not be reversed by the Supreme Court, because, generally speaking, "addresses to the jury, like all else relating to the trial, are under the supervision of the trial judge; * * * the judgment of the trial judge must, as in other cases of the exercise of discretionary power, be regarded as fixed;" and that no action having been taken before verdict, no case is presented for the application of the rule that "an abuse of discretion (in refusing a new trial because of improper remarks) may in a proper case be made the subject of an appeal." *Com. v. Windish*, 176 Pa. 167.

But the fact that we may not be reversible if we dismiss this reason and uphold the verdict, would not justify on that ground alone refusal of a new trial. A defendant in the toils, as this one is, battling for his life, is not to be made to suffer the extreme penalty simply because a formality has been omitted through the inexperience of a youthful attorney, when the complaint was, in fact, promptly made, but not in such manner as to be included in the record of trial.

It may be that the Court's special warning to the jury was, or that the general intelligence of the jury may have been, a sufficient protection against injury from district attorney's remarks; but it is also possible that the jury may have been fatally affected by the improper argument. Surely no man is so humble or so depraved that he should not have a trial so fair as it is humanly possible to make it. Race prejudice is one of the subtlest and

most deeply rooted impediments to a perfectly fair administration of justice. It may be deeply, though obscurely, imbedded in the minds of judges or juries, but be in these individuals so seldom called into activity that they themselves do not appreciate its existence or potency. To one who has read about the Sicilian vendetta, the adjective "Sicilian" suggests a racial reason that explains disregard for laws protective of human life.

Connecting such an epithet as "Sicilian gunman" with an appeal to the jury that they avoid "another compromise verdict", that they "do not put a premium on another Sicilian affair," that "its about time to find a verdict of murder in the first degree," especially when the appeals are made with great apparent sincerity and with impressive eloquence, may lead a jury unwittingly to arrive at a verdict which but for such exhortation would be impossible. We feel compelled to say this, notwithstanding the fact that we could conscientiously sustain this verdict if it had been rendered under circumstances entirely free from the possibility of a charge against the perfect fairness of the trial.

There was undoubted evidence that the defendant had armed himself, anticipating a meeting with the deceased, and that the killing was the result of a motive entertained during a number of hours; but there was also evidence that the deceased had uttered threats against the defendant and generally against Sicilians, and there was testimony of at least one witness, besides the defendant, tending to show that the deceased was the aggressor at the instant of the fatal act. While probably the jury justly discredited the defense of self-defense, yet no doubt should remain where the death penalty is involved that such an outcome would have resulted if the jury had been asked to weigh all of the evidence by those considerations which alone should have been submitted to them.

Court of Common Pleas of Luzerne County.

KRAATZ, ADMR., v. SUPREME LODGE K. OF P.

Beneficial societies—Insurance—Occupation of assured—Premiums.

Where one insured in beneficial society changes a prohibited occupation of bartender to occupation of "agent", and secures reduction of premiums, and afterward, without notice to society, reverts to prohibited occupation and continues to pay reduced premiums, judgment for recovery on the policy of insurance will be refused.

Rule for judgment for want of sufficient affidavit of defense.
Common Pleas, Luzerne county. No. 385, October term, 1918.

WOODWARD, J., June 17, 1919.—By a decision filed March 22, 1919, in this case, the rule for judgment for want of an affidavit

of defense was made absolute. On April 3, 1919, this decision was re-called and the defendant given ten days to file a supplemental affidavit.

Paul Kraatz sued to recover on a certificate of membership in the insurance department of the defendant, which had been cancelled. He died after bringing suit, and his wife, the beneficiary, was substituted as plaintiff.

The defense set out in the original affidavit was that the certificate had been cancelled because the plaintiff's decedent had changed his occupation to that of a bartender, which was a prohibited occupation under the laws of the society. We made the rule absolute because it appeared in the plaintiff's statement that in February, 1908, when the insured made a change from the fourth to the fifth class, he gave his occupation as "tending bar in brewery for help only, and my occupation for the last five years has been same and bartender." This was not denied in the affidavit of defense, nor was anything said about any further change in occupation up to the time of his death in December, 1918. We made the rule absolute on the ground that the defendant having accepted payments of premiums from the insured, notwithstanding his prohibited occupation fully disclosed in his application for change of class from February, 1908, until February, 1918, could not then cancel the certificate without refunding the premiums. On the representations of defendant's counsel that material facts had been inadvertently omitted from the original, we allowed the supplemental affidavit to be filed, which alleges that Kraatz, in 1913, changed his occupation from bartender in brewery for help only to agent and thereby received a reduction in his monthly payments from \$2.60 to \$2.20 per month; that on January 1 he abandoned his occupation as agent and engaged in the prohibited occupation of "bartender" without notice to and without the knowledge of the defendant, and without change in his reduced premiums; that such change without notice and continued payments of reduced premiums was a fraud on the defendant, and as soon as discovered the certificate was cancelled and further payments and tenders were refused.

This is a sufficient defense and if set forth in the original affidavit would have prevented judgment.

Rule for judgment is discharged.

HEEBNER v. WOITKELAWICZ.

Agency—Scope of—Mortgage—Payments of principal and interest.

Authority of agent (attorney) to receive payments of mortgage principal before due or in amounts less than the whole debt, cannot be inferred from his agency to accept interest payments. Mortgagor who fails to make investigation as to the scope of agent's authority, as above, is not relieved of obligation to mortgagee for whole amount of principal, without reduction for partial sums paid to another as agent.

Rule to open judgment. Common Pleas, Luzerne county. No. 130, December term, 1918.

WOODWARD, J., May 2, 1919.—By bond dated June 3, 1914, Charles Woitkelawicz promised to pay to G. Clayton Heebner the sum of \$600, with interest, in three years from the date thereof, and gave a mortgage on his property as security therefor.

On December 13, 1914, G. Clayton Heebner, the mortgagee, assigned the bond and mortgage to his mother, Ellen Heebner, but the mortgagor received no notice of the assignment except the constructive notice from its recording on December 24, 1914.

The transaction had been carried on through P. A. O'Neill, who acted as agent for both parties.

Interest and three payments on principal were made by the mortgagor to P. A. O'Neill, who accounted for the interest to the mortgagee or the assignee, but embezzled the principal.

When the mortgagor found that the bond and mortgage had been assigned by the mortgagee and that O'Neill had not accounted to the assignee for the payments of principal that he had made, the mortgagor tendered the balance due on the mortgage to the assignee, which tender was refused and judgment entered on the bond for the whole amount. The case comes before the Court on a rule to open the judgment.

Two payments of one hundred dollars each to apply on the principal were made by the mortgagor to O'Neill before the mortgage was due, and one of one hundred dollars after its maturity.

The payments were made to O'Neill, who had received the interest payments. The interest payments had been made to the mortgagee or his assignee through O'Neill, thus constituting O'Neill the mortgagor's agent for that purpose, but when it came to payments of principal before due, or in amounts less than the whole debt, the mortgagor was bound to inquire and satisfy him-

self that O'Neill had this authority. Such authority could not be inferred from his agency to accept interest payments. The mortgagor made no investigation as to the scope of O'Neill's agency, nor did the bond and mortgage give the right to anticipate payment of principal before it was due or to pay it in instalments. There was a printed clause in the mortgage as follows: "Provided, that the said mortgagee upon default for ten days in payment of said principal sum or of any instalment thereof, etc." This was inserted to cover a case where there had been a previous stipulation between the parties for the payment of principal in instalments. But there was no such stipulation in this case and therefore the proviso as to instalments was mere surplusage.

The acceptance of principal payments before due or in instalments after due not being within the scope of O'Neill's agency, and the defendant having failed to inquire and satisfy himself as to the extent of the agent's authority, is not relieved of his obligation to the plaintiff for the whole amount of principal without deduction for payments made to O'Neill and not accounted for by him to the plaintiff, but is relieved of any interest payments made to O'Neill, as such payments were authorized by the plaintiff by their course of dealing. The rule is, therefore, discharged, and the judgment allowed to stand as to principal and any interest due and unpaid by the defendant.

George Howorth, for plaintiff.

Miss S. M. R. O'Hara, for defendant.

BIXLER *v.* LEDERMAN.

Affidavit of defense—Contract—Goods sold and delivered.

Where written agreement calls for sale and delivery of jewelry of solid gold, rolled plate and assorted, co-temporaneous oral agreement that all were to be either gold plate or rolled plate would not avail, but averment in affidavit of defense that the goods "were nothing but fake jewelry, commonly called tinware, with gilt," would be sufficient.

Rule for judgment for want of a sufficient affidavit of defense.
Common Pleas, Luzerne county. No. 716, May term, 1919.

STRAUSS, J., October 17, 1919.—This suit is for jewelry sold and delivered at the price of \$192 on a printed and written contract calling for articles, some of which are described as "solid gold", others as "rolled gold plate" or "rolled plate", while others

still simply are to be "assorted" or "fancy assorted", without stating the kind of metal. The contract signed by both parties contained a clause that "salesman's authority is limited to taking orders on this form and no change or addition is binding unless in writing on the original order accepted by us (the plaintiff) at Cleveland, Ohio."

The affidavit of defense sets up:

1. A co-temporaneous agreement with the salesman (inducing the signature by defendant of the contract) that the plaintiff orally guaranteed the goods to be plated or rolled gold, and that if the goods, after delivery and examination, were not in every way satisfactory to defendant, he would have the full right to return the whole or any part to the vendor. The contract was signed October 23, 1918, by defendant, and approved and accepted by plaintiff in a letter dated October 25, 1918. The goods were delivered on or about November 15, 1918, found unsatisfactory, so reported by letter to the plaintiff in November, who by letter agreed to send the salesman on or before December 30, 1918, to go over the matter, and to retake the merchandise if not satisfactory.

2. The goods were not rolled gold or plated gold as agreed, but were "nothing but fake jewelry, commonly called tinware, covered with gilt."

3. The plaintiff did not send the agent to retake the goods on or before December 30 as agreed, wherefore defendant "reshipped all the goods, via the American Express Company, to plaintiffs at their proper address in Cleveland, Ohio."

The first ground of defense cannot avail defendant, as it is based on a modification of the written contract in violation of the clause limiting the salesman's power to the terms as printed or written, unless such change be approved in writing by the plaintiff.

The second ground is, however, sufficient if true—because the contract as drawn calls for considerable quantities of gold or rolled gold or gold plate, while the affidavit alleges that the goods received were nothing but gilded tinware. This is so sweeping a description that it needs no further specification. If true, it makes a good defense.

The third ground, if true, would also be good, provided the

goods were accepted by plaintiff from the express company. If the defense relied on this alone we would allow plaintiff opportunity to file an amended statement to meet this averment of the affidavit in case the fact were denied. That, however, is now unnecessary as a matter of pleading, in view of the sufficiency of the affidavit on other grounds. It may, however, become of importance at the trial.

Rule discharged.

C. B. Waller, for plaintiff.
David Oppenheimer, for defendant.

KOTARSKI *v.* JACKIER *et al.*

Laches—Execution to collect rents—Laches.

Where defendants, in execution issued to collect balance of rent, delay several months before motion to open judgment, and delay plaintiff's collection with unfounded claim, by third party, of ownership of goods, rule to open judgment will be discharged.

Rule to show cause why judgment shall not be opened. 'Common Pleas, Luserne county. No. 1073, November term, 1916.

STRAUSS J., April 2, 1919.—Here we have a dispute whether defendants moved from premises leased to them with or without plaintiff's consent, the rent having been paid to November 15, 1916, the day after the removal.

Plaintiff on November 23, 1916, issued execution to collect rent for the balance of the term, four and one-half months. The first move preventing the sheriff from collecting was an interpleader proceeding wherein one Kotz claimed to be the owner of defendants' household goods levied on. On March 22, 1917, the proceeding was dismissed.

On April 6, 1917, this rule was obtained. Had these defendants acted promptly they would have been entitled to this issue. Have they lost their right through laches and through supinely waiting while an unfounded claim of ownership by a third party delayed the plaintiff's effort at collection, and then instituted this proceeding?

In *McQuillen v. Hunter*, 1 Phila. 49, Judge Sharswood declared that:

"A party who is apprised of an execution must show diligence in coming to the court, nor can he delay until levy and condemnation. If he does, some good reason should be shown for the delay. None has been shown in this case, and we do not consider the evidence of pending negotiation as such. The moment the notice of the *fi. fa.* is received the party should apply for a rule."

Rule discharged.

RISHEL *v.* BYARS COUNCIL No. 282, J. O. U. A. M.

Incorporated societies—Political activity of member—Conflict with by-laws of society—Expulsion—Injunction.

1. Incorporated society may in its by-laws prevent a member from certain phases of political activity, such as addressing circular letters to members in behalf of certain candidates and soliciting members' signatures in favor of candidates, yet where the expressed purpose of the Order is the preservation of Americanism, the protection and encouragement of the public school system, and continued campaign against pernicious foreign influences, etc., some latitude is *ipso facto* extended to the conduct of individuals.
2. And where, after such political activity, such member has been expelled by the action of State and National Councils, final injunction would not properly lie to prevent judgment of expulsion until the parties have joined issue and the rights of each has been made clear, the detail of conflict established between the member's conduct and the by-laws, the validity of the trial to which the member has been subject, and as result of which he was expelled made clear, and for such purpose preliminary injunction may be continued.

Motion to continue preliminary injunction. Common Pleas, Luzerne county, No. 5, January term, 1917.

STRAUSS, J., September 4, 1917.—The plaintiff has set out in his bill, and has proved by evidence, that before the State judiciary of the Junior Order of United American Mechanics, of which the defendant is a subordinate lodge, in February, 1916, he was formally charged with an offense against the laws of the order in that he obtained signatures of several persons in their capacity as members of the defendant organization to a circular advocating the election of a particular person to public office in Luzerne county during the political campaign of 1915; that he was duly tried before said tribunal, convicted and sentenced to expulsion from the order, which sentence on appeal to the higher tribunal in the order was affirmed; and subsequently transmitted to the defendant for execution by excluding him from all rights and benefits in the subordinate lodge and in the order. The bill also sets out that the particular offense was charged to be in violation of Section I, chapter II, division VI of the National laws of the society which reads as follows: "No member, body, or organization of the order shall use the name of the order or any term derived therefrom or germane thereto, or any emblem, model, motto, or device belonging to the order for the advertisement or promotion of any enterprise or purpose whatsoever not expressly provided in the laws of the order, provided that this

section shall not apply to the periodicals published in the interest of the order."

We find the foregoing averments contained in the bill as established facts, and in addition thereto report the following facts:

(a) William J. Byars Council, No. 282, is a subordinate body of the Junior Order United American Mechanics of which the supreme and superior bodies are the National and State councils of said order.

(b) The proceedings hereinbefore referred to against the plaintiff before the State judiciary did not originate in any action by or before the defendant, nor were the charges heard by or before any tribunal of the defendant; nor did the defendant take any action whatever in the matter.

(c) The judgment of expulsion sought to be enjoined is not the act or judgment of the defendant, and the defendant has no power or authority over such judgment or expulsion.

(d) The judgment of expulsion sought to be enjoined originated in proceedings instituted directly before the State judiciary of said State council under the constitution and laws of the order as a court of original jurisdiction and the proceedings and judgment are part of the records of said State council.

(e) According to the laws governing said order it is the duty of the defendant to obey the final judgment of said State judiciary when officially apprised thereof. If the defendant fails to give effect to said judgment its charter may be suspended or revoked under the laws of said order.

(f) Neither the National nor the State council have been made parties to this proceeding. The defendant in the execution of the sentence of expulsion against the plaintiff acts merely as the agent of the superior bodies in the order.

DISCUSSION.

We shall not enter upon any extended discussion of the proposition that the plaintiff ought to have joined the National and State councils of the order as defendants. That the superior bodies in whom is vested the power and duty of construing the society's general laws, who alone had jurisdiction over the trial of the charges against the plaintiff, and who according to these laws imposed the sentence complained of, should be given their day in

court to defend this action seems to us self-evident. The decree of this court that might be entered against the defendant alone as the result of the bill in its present form ought to be enforceable not only against the subordinate lodge but against its superiors. The plaintiff's cause of action involves their acts and only incidentally the act of the subordinate lodge. The latter had no part in the trial, judgment or sentence but is the mere instrument or agent for execution.

But it does not follow as a necessary consequence that this injunction must be dissolved because those who should be principal defendants have not been joined. They will be given the fullest opportunity to defend this action if they desire to do so. The plaintiff, however, ought meanwhile enjoy protection against possible wrong that would result if it should hereafter be decided in a proceeding directly between this plaintiff and the defendant's superiors that the plaintiff has been unjustly dealt with by the tribunals of the order. We shall not allow the execution issued by those tribunals to be made effective through the act of this defendant but shall, by continuing this preliminary injunction, preserve the *status quo* until, with all the parties in court who might be interested to defend, a final decree shall be made according to the requirements of equity. We thus preserve the status because after considering the case upon its merits the attitude of the defendant seems not at all conclusive as to the binding character of the judgment that has by the order's tribunals been entered against this plaintiff.

As bearing on the merits of the case we have carefully examined the constitution of this order relating to the National, State and subordinate councils.

Manifestly the purposes of this order are two-fold, political and beneficial. On its political side the order has adopted a declaration of principles from which we ascertain that it champions: Such immigration laws as will exclude from shores of this land the ignorant, the vicious and the lawless who would be a constant menace to our institutions; the American public school system and compulsory education; opposition to interference by any church of whatsoever nature or name with the temporal affairs of our country and to the union of church and state under whatsoever guise; the reading of the Bible in the public schools; a

belief that there are present in this country great and powerful enemies to our institutions against whom the order seeks to array itself and to unite itself with all who are in heart, deed and word Americans. In a preamble to its constitution it is declared that the purpose of the order is "to foster the patriotism, promote the welfare and broaden the citizenship of the members of the order."

By article V of the National constitution the objects of the order are stated to be: To maintain and promote the interests of Americans and shield them from depressing effects of unrestricted immigration, to assist them in obtaining employment and to encourage them in business; to uphold the American public school system, to prevent interference therewith, and to encourage the reading of the Holy Bible in the schools thereof.

In Section I chapter II of the National laws it is provided that the National council shall have, among other permanent committees, one on National legislation.

As part of the evidence submitted by the plaintiff for the purpose of maintaining this injunction, it was proved that it has been (logically and naturally the result of the foregoing proclamation of principles it seems to us) common practice not only for individuals in this order in their capacity as members to unite in publicly advocating the election of certain persons to certain public offices prior to the year 1915, but that Byars Council has sent representatives to conventions organized under the name of Sons of Luzerne, the purpose of which was to further the cause of certain candidates for office at elections then about to be held.

Under our system of government the objects which this order has assumed as its special mission to advocate and further, can only be achieved or maintained through success at the ballot box. In the nature of things therefore it would seem as if this order had pledged itself to influence elections at least whenever the special causes which by its laws should be advanced are directly or indirectly the subject of consideration by the people and the issues of elections. It would seem to be entirely cognate to the mission of the order to advance its general political ideas by cooperation with one or another of the political parties, or some times with one, and at other times with another, and to be a difficult question for any individual to decide just how far, when and through what candidates the spirit of the order requires his participation in active politics. Undoubtedly the order's National judiciary, if it were a defendant here, would maintain that when an individual seeks public office he is engaged in an enterprise within the meaning of the section of the law above quoted, and that when the citizens go to the polls to vote for such office they are also engaged in or are promoting the same enterprise. Generally speaking,

however, it may well be doubted whether the common purpose of all people to maintain good government, and for this purpose to conduct elections, is in any true sense of the word an enterprise. It certainly is not a purpose prohibited by the by-laws which because not "expressly provided for in the laws of the order," a member has no right to form and achieve. This is rather a duty, the omission to perform which would be the mark of bad citizenship. Not a voluntary undertaking on the part of citizens, it is an obligation from which they have no right to escape. The man who offers himself as a candidate for office from the selfish standpoint may in a sense consider it an enterprise; but in truth, and according to the theory of our institutions, public office should not be sought from selfish considerations only, but as the result of an impulse to contribute to the general welfare by faithful performance of public duty. But even though seeking public office were conceded to be "an enterprise" within the meaning of this by-law whereby the use of the name or emblems of the order displayed on posters, or in newspaper advertisements, by the candidate would be forbidden, it does not necessarily follow that a letter by one member of the order to another in the name of the order and for considerations involving the sentiments or principles which the order represents would be such a violation. The public welfare might be deemed so deeply involved that the member would be justified in conscience to use every honorable means to secure the election of his favorite candidate, and a by-law might be questioned as unreasonable and void if it prohibited an act in which there is neither moral nor legal turpitude but which might be very effective in promoting the best public interest.

It may well be, that long-sighted precautions on the part of members of this order will dictate opposition to any candidate for any office who is known to be hostile to restricted immigration, to the separation of church and state, to the public school system, to the reading of the Bible in the public schools, or to a protective tariff calculated to encourage American citizens in business; and this opposition may be regarded by members to be political duty so that gaining public office shall become the certain reward for fidelity to principles intended by the order to be incorporated as fundamental in our government, no matter how remote the influence of the particular officer, or the duties imposed upon him in connection with his particular office may be from directly affecting decision upon these particular questions.

Political parties, in order that they may gain the power to apply their doctrines, naturally require that thorough, consistent and uninterrupted support be given only to men who will seek office on condition that they have proved themselves faithful to certain distinctive principles; and a similar policy would just as naturally come into existence in a society founded on political sentiment.

No decision of the courts of any State has been called to our attention where a construction has been placed upon any similar by-law of any society. It would seem to us to be at least an open question concerning which very good reasons might be advanced sustaining the plaintiff's point of view that no participation in any public election, no advocacy of any particular person for office is to be regarded as a prohibited enterprise since the general objects of this order include political purposes that cannot in the nature of things be accomplished except through political instrumentalities. Certainly no such result should follow because of a stickling or doubtful construction of this by-law.

In *Com. v. The Society*, 2 Binn. 440, it was said by Chief Justice Tilghman, that "the right to membership (in a society) is valuable and not to be taken away without an authority fairly derived either from the charter, or the nature of corporate bodies. Every man who becomes a member looks to the charter; in that he puts his faith and not in the uncertain will of the majority of the members. * * * Without an express power in the charter no man can be disfranchised unless he has been guilty of some offense which either affects the interest of good government of the corporation, or is indictable by the law of the land."

It follows that if the acts charged against this plaintiff shall on final hearing be held not to be in violation of the above quoted by-law, no offense was committed against the society or against any law. In that case the plaintiff's expulsion, though under the form of law and by the appointed tribunals, will be held arbitrary and illegal.

We continue this injunction until further order thus giving the plaintiff an opportunity to bring into court as defendants the National and State councils and judiciaries of the order so that these may be given an opportunity to defend the judgment which they ordered the present defendant to execute by excluding the plaintiff from the benefits of the society. Whether these other parties may be joined in this proceeding against their will, or whether it must be done by a new action, we do not decide. It would simplify matters very much if they voluntarily appeared and took issue with the plaintiff as to his rights and as to the validity of the trial to which he has been subjected in the order's tribunals.

In filing this opinion we do not intend to decide finally that a by-law may not by apt words lawfully prohibit action like that which was made the basis of the charges against the plaintiff, but only that the by-law in its present form leaves the matter open to doubt, wherefore the status should be preserved at least until the proper parties shall have been given their day in court.

W. A. Valentine, F. P. Slattery, for plaintiff.
J. H. Dando, for defendant.

FONTANA PRODUCTIONS, INC., v. THEIS.

Contract—Consideration—Picture film.

Where theatre owner pays part of contract price for feature film, starts it running, discovers defects, notifies lessors, who agree to replace film, but do not do so, and film continues the week run, rule for judgment, for insufficient affidavit of defense, for balance of contract price of film, will be discharged, and defendant given opportunity to show failure of consideration for note.

Rule for judgment for want of a sufficient affidavit of defense.
Common Pleas, Luzerne county. No. 323, December term, 1917.

WOODWARD, J., October 4, 1918.—This is an action of assumption on a promissory note given by the defendant to the plaintiff for \$1,875.00, dated May 1, 1917, payable in two months.

The note represented the last two payments on a contract for a moving picture film called "Thos. H. Ince's Civilization," which the plaintiff agreed to furnish to the defendant for exhibition in Luzerne and Lackawanna counties for the consideration of \$12,500, payable 25 per cent. on signing the contract; 25 per cent. before the first showing of the picture; 25 per cent. before the second showing; 10 per cent. before the third showing; 10 per cent. before the fourth showing, and 5 per cent. before the fifth showing.

The first showing of the picture was at the Majestic Theatre in Lackawanna county on June 4, 1917, when it ran that week from the fourth to the ninth, so that the fifth and sixth payments under the contract were not due until the eighth and ninth of June, 1917, respectively. Why the note for these payments was given on May 1, 1917, payable in two months, does not appear in the pleadings, but it does appear from the correspondence between the parties attached to the affidavit of defense, that the payment of these last two instalments at the times stipulated was waived and the note accepted in lieu thereof.

The defense is that the film was defective and not a "brand new positive print", as called for in the contract. The defendant started to exhibit the picture in Scranton on June 4, 1917, but found it defective and specifies the defects in the affidavit of defense. He thereupon wired the plaintiff at Philadelphia, asking for a better print, which the plaintiff promised to send, but failed to do so after several requests. The defendant, however, kept on exhibiting the film throughout the week. He also alleges that the film was defective, in that it was cut down from ten reels to eight. As to this alleged defect we do not find that the contract calls for any specified number of reels, and the plaintiff in his answer states that it was cut to meet the demands of the Pennsylvania State Board of Censors. The affidavit also presents a counter-claim for damages suffered by the defendant, made up of estimated loss of receipts and by reason of the alleged defective film.

The plaintiff filed an answer denying the material allegations of the affidavit.

The question presented by the pleadings is: Whether the defendant, having paid \$10,625 on the contract, was bound to stop the performance when he found the film defective, and demanded a new film, or whether having used the film he is not bound to pay the balance.

The question whether the film was a "brand new positive print", as specified in the contract, or a "first class print", as designated in the affidavit of defense, is the material question of fact raised by the pleadings. Unless we hold that, assuming the film defective, nevertheless the defendant is bound to pay because he used it, we should discharge the rule and send the issue to a jury.

We are not prepared to so hold. It is not the same as an article that is consumed in the using, and the defendant was led on in his use by the promise of the plaintiff to send a better print. If the defendant can show that there was a failure of consideration for the note he will not be obliged to pay it. The claim for counter-damages can be considered on the trial.

Rule for judgment discharged.

W. H. Goodwin, J. E. Jenkins, for pl. intiff.

B. R. Jones, for defendant.

MILES v. SCHMIDT SONS BRICK MFG. Co.

Interpleader—Automobile—Evidence of ownership.

1. Where in interpleader proceedings instituted by wife to recover automobile levied upon as property of husband, testimony is offered that wife paid for machine entirely with her own money, no claim of payment by husband, that machine was stored in garage owned by wife on property of wife, and that credit was given by execution plaintiff to husband before license for automobile was issued in husband's name, and jury finds for plaintiff in issue, verdict will not be disturbed.
2. Possession of license and tag in husband's name is merely *prima facie* evidence of ownership, and case is distinguished from *Steel v. Latrobe*, 25 D. R. 1078.

Sheriff's Interpleader. Common Pleas, Luserne county. No. 553, December term, 1917.

WOODWARD, J., January 29, 1919.—This is an issue in a sheriff's interpleader, in which the plaintiff claims to be the owner of a Ford automobile levied upon by the sheriff as the property of Riley F. Miles, plaintiff's husband, by an execution issued on a judgment recovered by the defendant, John A. Schmidt Sons Brick Manufacturing Company, against Riley F. Miles. The jury found a verdict in favor of the plaintiff, whereupon the defendant's attorney filed reasons for a new trial and in arrest of judgment.

The only reason that appears to us to have any merit is the sixth, as follows:

"The Court erred in its charge to the jury that the claimant was not in a position to assert title to said car, and should have affirmed defendant's point, which is as follows: 'The license for the automobile having been taken in the name of the husband, and the oath of the applicant having stated it to be his property, and the wife being aware that the husband took out the license, the Court is asked to find as a matter of law that the machine belonged to the husband.'"

And in support of this reason they cite the case of *Steel v. Latrobe Auto Company*, 25 District Reports, 1078, the syllabus of which is as follows:

"Where in a sheriff's interpleader it appeared that an automobile had been leased to the defendant in the execution, and he, with the knowledge of the owner, made application to the highway department for a license, and such license was issued to him as such owner, and the tag displayed on the machine: *Held*, that the owner, by such methods having enabled the defendant to obtain credit for the repair of the machine, was not in a position to assert his title as against one who had been misled by his misconduct and want of conformity to the law."

The distinction between *Steel v. Latrobe Auto Company* and the case at bar, is that in the *Steel* case credit was given on the faith of the exclusive possession of the automobile by the defendant in the execution, as well as on the faith of the license having been taken out in his name, whereas in the case at bar the possession of the Ford car was no more in the husband than in the wife, as it was kept in a garage belonging to the wife on property owned by the wife, and the license was taken out in the name of the husband after the credit had been given by the defendant to him. That the plaintiff purchased the automobile with her own money was established by her to the satisfaction of the jury. There was no claim on the part of the husband or any one else that he contributed any money to the purchase of the automobile, and we were asked to instruct the jury that the mere application for a license, with the knowledge of the wife, accompanied by an affidavit on the part of the husband that he was the owner of the automobile, was sufficient in law to establish the ownership so as to defeat the plaintiff's claim. We refused to so instruct the jury and told them that while the license tag was *prima facie* evidence of ownership, that it was not conclusive, and if they believed from all the evidence that the plaintiff's money purchased the automobile they could find for her, which they did. In this we see no error, and we find none otherwise in an examination of the record and the charge of the Court.

Motion for new trial denied.

N. Jacobs, for plaintiff.

C. M. Bowman, for defendant.

WILDONER *v.* CEN. POOR DIST. LUZ. COUNTY.

Negligence—Charitable institutions—Responsibility for acts of employes.

A corporation chartered for charitable purposes, having limitation on its land holdings, and its land used for farming purposes, for crops to be consumed on the place, is not liable for negligence of its employes in setting fire to timber on adjacent land. Case distinguished from *Winnemore v. Philadelphia*, 18 Superior, 625, where defendant was operating an office building for profit apart from the main institution.

Rule for a new trial. Common Pleas, Luzerne county. No. 776, May term, 1916.

WOODWARD, J., June 27, 1919.—The plaintiff's third reason for a new trial presents the question at issue. It is as follows:

"The Court erred in directing judgment for defendant in reference to plaintiff's claim for damages for loss of timber caused by the fire, due to alleged negligence of the defendant."

Plaintiff had an interest in some timber on a tract of land leased by the defendant. The land was being cleared for cultivation by the inmates of the defendant institution, who were burning the brush on one end of the tract. The fire, through the negligence of the defendant's servant, spread and injured a large portion of the tract. We gave binding instructions to the jury to find in favor of the defendant, because the defendant being a charitable institution is not liable for the negligent acts of its servants. We followed the decision of the Supreme Court in *Fire Insurance Patrol v. Boyd*, 120 Pa. 624. Plaintiff's counsel say that we should have followed *Winnemore v. Philadelphia*, 18 Superior Court, 625, where it was held that the defendant as trustee under the will of Stephen Girard was liable for the negligence of the operator of an elevator in an office building owned by the Girard Estate, the net rental of which was devoted to the support of Girard College, a charitable institution, because the office building was operated for a profit on a piece of land separate and apart from the college, and that the damages should be included in the cost of operation to be deducted in arriving at a net profit or rental devoted to the charity. One of the Acts of Assembly governing the defendant in the case at bar, provided that it could hold any lands not exceeding the yearly value of ten thousand dollars for the employment of the poor of the district. The testimony showed that the land upon which this timber stood was held and maintained for farming purposes to give the inmates of the poor house occupation in raising crops to be consumed on the place. We see no analogy between such a use and the use to which the office building was put in *Winnemore v. Philadelphia*, and no application of the *Winnemore* case to the case at bar.

Motion for new trial refused.

B. W. Davis, for plaintiff.

C. E. Keck, for defendant.

YAZWINSKI v. LEWITH.

Sale of land—Option—Deed giving different dimensions—Oral authorization of agent—Specific performance—Damages.

Where one pays for option for purchase of land and deed is submitted for land of different dimensions than orally stated, he will be sustained in refusal to accept deed. And where in suit for recovery of option, defendant withdraws motion for non suit and at suggestion of Court substitutes motion for binding instructions, plaintiff will not be entitled to judgment *n. o. v.*, but new trial will be awarded. Contract for sale of land not in writing cannot support specific performance but damages may be recovered for breach.

Motion for new trial and for judgment n. o. v. Common Pleas, Luzerne county. No. 1268, October term, 1916.

WOODWARD, J., January 3, 1915.—The defendant, Lewith, owned a lot of land on Auburn street, in the city of Wilkes-Barre. A real estate agent, named Berk, came to Lewith and asked him if he had any real estate for sale. Lewith told Berk of said lot and orally authorized him to sell it.

Berk interested the plaintiff, Yazwinski, who went to Lewith and inquired of him whether Berk was Lewith's agent to sell the property, to which inquiry Lewith answered in the affirmative. Yazwinski further asked Lewith the dimensions of the lot and was told by Lewith that the lot was about fifty feet in front, on Auburn street, by one hundred and seventy-five or one hundred and eighty feet in depth.

Yazwinski then returned to Berk and the following option was executed:

"Wilkes-Barre, Pa., July 5, 1916.

"I, Max Burk, agent for Edward Lewith, in consideration of the sum of \$100 the receipt of which is hereby acknowledged, paid to me by John Yazwinski, do hereby grant unto the said Yazwinski the right or option to purchase within 30 days from the date hereof, all that certain lot of land situate No. 37 Auburn street, Wilkes-Barre, Pa., being about 50 feet in front on said Auburn street by about 175 feet in depth, together with the improvements thereon for the price and sum of \$3200.

"And the said Max Berk agrees to furnish to the said John Yazwinski a good and sufficient deed to the said property, and the said property is to be sold free and clear of all mortgages, liens or incumbrances. All rents, taxes, water bills, insurance, etc., to be adjusted to the day of the transfer of title to the said property.

And the said John Yazwinski hereby agrees to the foregoing agreement, price, terms, etc.

"MAX BERK, (SEAL)
"JOHN YAZWINSKI, (SEAL)"

The plaintiff then paid to Berk \$100, but when the deed was tendered the description of the lot called for forty-five feet front on Auburn street and one hundred and five feet in depth. Plaintiff refused to accept the deed and demanded the return of the \$100 with \$25 paid to his attorney "for legal services in connection with the examination of said option and of the title to said land." The defendant and Berk refusing to pay said moneys, plaintiff brought this action.

Plaintiff contends that he is entitled to recover from defendant because Berk was defendant's agent; and because Lewith stated to Berk, Yazwinski and a man named Golida that the lot was fifty feet by one hundred and seventy-five or one hundred and eighty feet in dimensions.

At the conclusion of plaintiff's testimony, defendant moved for a compulsory nonsuit but, at the suggestion of the Court, rested and asked for binding instructions, which were given.

Defendant contends (1) that the transaction is controlled by the statute of frauds in that Berk had no written authority to act as agent of Lewith, in the sale of the property; and (2) that the default in the execution and consummation of the contract lies not with defendant but with the plaintiff.

We are clear that in giving binding instructions in favor of defendant on the ground that defendant's agent had no authority in writing, we fell into error. Our ruling would have been correct, had plaintiff been endeavoring to compel a specific performance of the parol contract, but as his action was only for damages our ruling was erroneous.

"A contract for the purchase of land, not put in writing passes no interest to the purchaser, and furnishes no right, in law or equity, to demand a specific performance, but damages may be recovered for the breach of it." Bender's *Admrs. v. Bender*, 37 Pa., 419; *Ewing v. Tees*, 1 Binney, 450.

As to defendant's second contention that the default in the execution and consummation of the contract was plaintiff's default, we cannot see that it is of very much weight under the circumstances.

If, as testified to by plaintiff and his two witnesses, defendant, by representations as to the dimensions of the lot, induced plaintiff to sign the contract plaintiff would be justified in refusing a deed with greatly different dimensions.

But plaintiff contends that as the case stands, he should be awarded a judgment *non obstante veredicto*; and this contention we would sustain if we did not feel that our suggestion induced the withdrawal of the motion for a non suit and the making of the motion for binding instructions. It would be grossly inequitable thus to deny to the defendant his defense.

Motion for a new trial allowed and the motion for judgment *non obstante veredicto* denied.

M. J. Mulhall, for plaintiff.

W. A. Valentine, for defendant.

COLEMAN *et al. v.* RELIANCE COAL CO.

Coal lease—Reasonable time to resume operations after interruption—Ejectment—Oral variation of written terms.

Where lease of coal property includes clause that in case of encountering unusual difficulties such as faults in strata, accident, fires, etc., lessee is to be released from payment of minimum royalties for reasonable time, and to use best efforts to overcome said difficulties, otherwise property to revert to lessor, lapse of eleven years not to be construed as reasonable time, and in case of such neglect of lessee to resume operations, lessor will have the right to re-enter and re-possess.

Where agreement between the parties is alleged, varying terms as above, it should be submitted if written; if oral it cannot be considered if lacking allegation of fraud, accident, mistake or separate consideration.

Ejectment. Rule for judgment on the pleadings. Common Pleas, Luzerne county, No. 515, May term, 1918.

WOODWARD, J., September 18, 1918.—By coal lease dated June 9, 1906, Isaac B. Feltz leased to Theodore Hogan the coal under a tract of land in said lease described.

Isaac B. Feltz died and his interest in the lease passed to the plaintiffs therein. Theodore Hogan assigned his interest to the defendant which went into possession but never paid any rent or royalty after May 1, 1907.

In April, 1918, the plaintiffs filed their praecipe for a writ of ejectment, together with their declaration and abstract of title. The defendant filed an answer which put the case at issue under the provisions of the Act of June 7, 1915, P. L. 887.

On June 7, 1918, plaintiff filed exceptions to the defendant's answer and the Court granted a rule to show cause why judgment should not be entered in favor of the plaintiff for the land described in the writ.

The proviso in the second section of the Act of 1915, is "that the Court may on rule enter such judgment on the pleadings in favor of either party as it may appear to the Court the party is entitled to."

The answer of the defendant to the charge of default in payment of minimum rental stipulated in the lease is that:

"The defendant denies that it has violated any of the covenants in said lease contained and to be by it performed, averring in this connection:

"That all rentals or royalties payable to the lessor in said lease named, Isaac B. Feltz, were fully and promptly paid to said Feltz until on or about May 1, 1907, at which time defendant in the course of its mining on said leasehold encountered a very unusual and serious series of rock and sand faults which made it entirely impracticable and unreasonable to require the defendant to continue mining therein; wherefore the said Feltz agreed with the defendant that from and after said date last mentioned the payment of further rentals or royalties should cease and be suspended until such time as he, the said Feltz, would procure and provide a suitable and convenient area of surface upon and through which the defendant would be able to make all necessary openings for the reasonably safe and economical removal and preparation of the coal from the demised premises. Notwithstanding his undertaking and agreement, as above set forth, the said Feltz, in his lifetime, utterly failed and neglected to provide the defendant with any of the surface area aforesaid, and since his death the plaintiffs, though frequently requested by the defendant to carry out the said agreement of said Feltz, have likewise failed and neglected so to do."

Plaintiff's exceptions to this answer are:

1st. That it does not state whether the alleged agreement modifying the lease was written or oral.

2nd. That if it is written there is no copy attached.

3rd. That if it was oral it is incompetent to vary the written lease because

- (a) There is no allegation of fraud, accident or mistake.
- (b) There is no allegation of any consideration.

These exceptions are well taken. The lease provided for a minimum monthly rental of \$700.

It also provided for the relief of the lessee in case of flaws or unavoidable accidents as follows:

"It is provided always that if in consequence of serious flaws or accidents happening by fire or other casualties in the mines upon said premises or the breaker used in preparing the same, or of the destruction of the property in anywise, or through unavoidable accidents happening, if the lessee shall be unable without fault of his own to mine and transport to market the coal as aforesaid, then in such case during the continuation of said obstruction or interruption unavoidable the lessee shall be released from the payment of said minimum cash rental which otherwise would become due and payable during such period. It being understood and agreed that in every case the lessee is to use his best endeavors and to the utmost of his ability to cause the removal of said obstruction and interruption as soon as possible, and is only to be relieved as aforesaid for a reasonable time. It is further provided that if the lessee shall fail through wilful negligence or refusal, or in anywise, or wilfully violate any of the covenants herein, said failure or violation shall at the option of the lessor work an absolute forfeiture of this lease, and which lessor shall have a right thereupon to enter and repossess said premises as in its former estate, and lessee thereupon to eject and remove, anything herein contained to the contrary notwithstanding. And in case a cause of forfeiture shall arise at any time and be either expressly or by implication waived, a right of forfeiture shall nevertheless remain and continue and may be put in force whenever and as often as new cause shall arise."

The answer alleges that serious faults were encountered in May, 1907, over eleven years ago, but does not allege that the lessee has used "his best endeavors and to the utmost of his ability to cause the removal of said obstruction and interruption as soon as possible". The lease provides the lessee is "only to be relieved as aforesaid for a reasonable time".

It cannot be said that eleven years is a reasonable time for the

relief of the lessee, and the alleged agreement set up by the defendant with Isaac B. Felts, who died March 25, 1907, eleven years and six months ago, does not fulfill the obligation of the lessee to use its best endeavors to cause the removal of said interruption.

Plaintiff's exceptions to the defendant's answer sustained; rule absolute and judgment in favor of the plaintiffs and against the defendant for the land described in the writ.

EYERMAN *v.* CASTELLANI.

Trespass—Wilful injury by driver of automobile—Owner's responsibility.
Defendant automobile owner, in action of trespass for injury wilfully done by employe driving the car, is not responsible except on theory of negligence of driver, and such theory is inconsistent with jurisdiction of justice of the peace, whose judgment for plaintiff will be reversed on certiorari.

Certiorari. Common Pleas, Luzerne county. No. 170, July term, 1919.

STRAUSS, J., October 14, 1919.—This action is trespass. The cause is for "injury wilfully done to plaintiff's personal property on April 11, 1919, by Bart Perroni, the employe of the defendant, driving defendant's automobile into and damaging the plaintiff's automobile."

So far as this expresses a cause of action against the defendant, it is necessarily upon the theory of the defendant's responsibility for the acts of his agent. But the defendant is not responsible for the wilful wrongs of an employe who drives his automobile. He might be responsible for the driver's negligence, and undoubtedly it was upon that theory that a judgment was rendered against him by the justice, but the theory is inconsistent with the jurisdiction of the justice.

Proceedings reversed.

M. H. Salsburg, for defendant.

KEEFE *v.* COUNTY OF LUZERNE.

Contract—Bridge—Engineer's commission and additional sum for completion—Consideration.

Where bridge contract between county commissioners and engineer provides for commission of five per cent. on total cost, and additional sum to engineer for completion within certain period, and bridge is completed substantially, with some delays to travel through minor features admittedly not chargeable to engineer, and where contract showing additional sum for completion predicates additional expense on engineer, county cannot escape payment of said additional sum on the ground of no consideration.

Action of assumpsit, affidavit of defense and demurrer. Common Pleas, Luzerne county. No. 258, March term, 1917.

SCHWARTZ, J., September, 1917.—On February 13, 1913, the county commissioners employed the plaintiff as engineer by adopting the following resolution:

"Be it resolved, that D. A. Keefe be employed as engineer for the preparation of plans and specifications and to perform all work in connection with the construction of the Nanticoke bridge, and that a contract for this purpose be entered into between the said engineer and the county of Luzerne providing for a compensation of five per cent. based upon the cost of construction, and that the further sum of \$2500 be paid the said engineer upon condition that the bridge be completely constructed within one year from the letting of the contract for construction."

In consequence of this resolution a formal contract was executed between the county and the plaintiff, whereby the plaintiff agreed to make all necessary preliminary estimates and plans to enable the party of the first part, the county, to decide upon the type of structure best fitted for the conditions existing at the place of location of said bridge; also to prepare plans and specifications and supervise the making of necessary borings, soundings and surveys for the purpose of constructing proper and substantial foundations for the location of abutments and piers for said bridge; also to prepare plans and specifications for the sub-structure and for the superstructure and assist said party of the first part in examining all bids that may be submitted for the construction of said bridge; in preparing and letting contracts in connection with the construction of said bridge, the borings, piers, abutments or any portion thereof; in checking over working drawings submitted by contractors; also to inspect the steel work

at mill and shop or have said steel work inspected by party or parties approved by county commissioners and furnish a competent inspector to oversee the work in the field; to personally supervise and superintend the same and to be the resident engineer in charge of the work, and to make monthly estimates for the guidance of the party of the first part in making payments on all contracts and to make the final inspection and estimates necessary to enable the said party of the first part to accept and approve said bridge after the completion of the same; finally to render such technical assistance as bridge engineer as may be necessary and required to enable the county commissioners to properly and faithfully perform their full duty as commissioners in constructing said bridge at the location aforesaid. In consideration whereof the party of the first part agreed to pay to the party of the second part an amount equal to five per cent. of the total cost of the work * * * and in order that the bridge may be constructed within the time specified in the contract for the construction thereof, namely, one year from July 14, 1914, and to provide for the extra cost of inspection made necessary by reason of various parts of the work being simultaneously constructed and in consideration of the party of the second part providing and paying for all inspection as hereinbefore set forth, to pay to the party of the second part the additional sum of \$2500 only in the event that the bridge is completed and satisfactorily constructed within the period aforesaid, namely, one year from July 14, 1914.

The statement filed sets out that the construction of the bridge was let July 14, 1914, to the Dravo Construction Company of Pittsburg, Pa., and that on July 14, 1915, it was open to public travel but incomplete in certain minor details, and then sets out at great length various occurrences alleged to have caused delay all of which delays are averred to be chargeable against the defendant and not against the plaintiff; and these are followed by general averment that the plaintiff was able and ready to complete said bridge before the time prescribed in the contract but for the conduct and delays of the defendant, and that said bridge was fully and entirely completed August 28, 1915. The statement admits that plaintiff received the five per cent. provided for in this contract but complains that the defendant has not paid the

further sum of \$2500 demandable under the last quoted section of the contract. The statement originally contained a claim for \$109.19 being interest upon the final payment on commissions withheld for fourteen months, but by an amendment to the statement that portion of the claim has been withdrawn, and there is nothing now demanded in the suit except \$2500 with interest from August 28, 1915.

The affidavit of defense is in the nature of a demurrer which admits that plaintiff was not chargeable with the delay in the construction of the bridge, and the only ground upon which liability is denied is set out in the affidavit in the following words: "Defendant has refused and still does refuse to pay the plaintiff's claim of \$2500 based upon the resolution of the county commissioners as recited in the second paragraph of plaintiff's statement and upon the contract executed pursuant thereto incorporated in said statement by copy marked 'Exhibit A' for the reason that the said claim is founded upon no legal consideration and is void."

No brief has been submitted and on the verbal argument the only reason suggested on behalf of the defendant for sustaining the defendant's contention that there was no consideration is based upon the theory that the provision in the contract for the payment of \$2500 is severable from the provision whereby compensation was by commission of five per cent. which commission it is argued was intended to be a full payment for the services rendered whereby the \$2500 became a mere gratuity. We are unable to follow this argument. It seems clear enough that plaintiff was employed in the first instance upon a basis of five per cent. and \$2500, his right to the \$2500 being subject to the condition that the bridge should be completed before July 14, 1915.

The averments in the statement clearly indicate that substantially the bridge was finished so that it was open to public travel within the period, but that in minor details certain delays were caused by the defendant. The defendant could not, by its supineness or failure to act promptly, destroy any portion of the compensation which it had agreed to pay to the plaintiff. He was liable to lose the \$2500 only by his own default. Moreover, the contract itself shows that this special sum was an allowance

made in consideration of the construction of various parts of the bridge simultaneously whereby additional expense would be imposed upon the plaintiff in the performance of his own portion of the contract.

We are of the opinion that the defendant has not shown a legal ground for refusing to pay this amount.

Judgment for plaintiff and against the defendant for \$2500 with interest.

M. J. Mulhall, for plaintiff.
J. M. Stack, for defendant.

FARRINGTON *v.* FORTY FORT BOROUGH.

Viewers—Appeal—Change of grade—Damages.

Where in appeal from viewers estimating damage to property from change of grade, jury allows a sum beyond plaintiff's own estimate of damage and beyond that of additional witness, new trial will be awarded.

Rule for new trial. Common Pleas, Luzerne county. No. 461, May term, 1910.

WOODWARD, J., October 18, 1918.—This is an appeal from an award of viewers disallowing the plaintiff's claim for damages alleged to have been done to her property by a change in the width and grade of Wyoming avenue, on which her lot is situated in the defendant borough.

The only reason we need consider is that the verdict of \$2500 is excessive.

The plaintiff put her damage at \$1500, being the difference between \$5,000 before the change and \$3,500 after. The only other witness called by her on value put her damage at \$2,080, being the difference between \$6,080 before and \$4,000 after. How the jury arrived at an amount higher than either is not apparent, but their verdict cannot stand and should not exceed the amount placed by the plaintiff on her own damage, which is \$500 more than she claimed before the viewers. As she made no claim for damages by detention, we think it fair to let it stand where she placed it at the trial.

The motion for a new trial is therefore allowed unless the plaintiff within ten days from notice of the filing of this decision accepts of record the amendment of the verdict from \$2,500 as rendered by the jury, to \$1,500 as fixed by the Court.

J. R. Halsey, R. Trescott, G. J. Llewellyn, for plaintiff.
C. D. Coughlin, for defendant.

NOWICKI *v.* WEST END COAL CO.

Workmen's Compensation Act—Injury to employe on premises of employer.

Where injury to employe is caused by operation of defendant's business or affairs on defendant's premises, such as operation of train of cars, injured employe is entitled to compensation whether at time of injury he is himself actually engaged in furthering the business of employer or not, unless there is evidence that injuries were self-inflicted:

Appeal from workmen's compensation board. Common Pleas, Luzerne county. No. 288, January term, 1918.

WOODWARD, J., September 19, 1918.—This appeal is from the judgment of the workmen's compensation board affirming the decision of the referee, disallowing compensation for the death of Martin Nowicki, late the husband of the claimant, and an employe of the defendant, who was killed on August 3, 1917, on his way home from his work, by falling from a coal car in a moving train of loaded cars, while attempting to board said car, against the orders, rules, and printed and posted notices of the defendant, forbidding their workmen to board the cars while in motion, and against the positive instructions not to do so communicated verbally to the decedent just a few minutes before he was killed. The train of cars which he attempted to board was operated by the defendant on its own premises, and a roadway was provided by the defendant which furnished a safe way for the employees to take to and from their work. These facts were found by the referee. From the testimony taken by him, the defendant's counsel describe the situation in their brief, as follows: "The mining property of the defendant where this accident occurred, consists of three tunnels or drifts driven into the mountain. A railroad track from each drift meets at a common point called the junction, and from here all the coal mined in the various drifts is taken on a single track to the defendant's breaker a mile or so away. The opening of the drift where the decedent worked was about 1,400 feet from the junction. While walking to the junction a loaded trip was passing over the track leading from a tunnel other than the one where decedent worked. The decedent left his direct course to the junction, crossed over to the tracks on which this loaded trip was passing, and attempted to board the moving trip when it was but about 400 feet from the junction, where it would have stopped.

The referee disallowed the claim on the ground that the decedent's death was not the result of an injury by an accident in the course of his employment, because he was not actually engaged in the furtherance of the business of the defendant.

Without taking issue with the referee on this point, although

the case of *Jones v. Laughlin Steel Co.*, 2 D. R. 1293, and the English cases there cited, regard the employe in the "course of his employment", when he is going or returning from his work, yet we must reverse the decision of the referee and the board on other grounds.

Section 301 of the Workmen's Compensation Act, at page 739, P. L., provided that: The term "injury by an accident in the course of his employment" shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the premises of the employer or elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer's business affairs thereon, sustained by the employe, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employer's presence thereon being required by the nature of his employment."

Assuming for the purpose of the argument that Nowicki was not engaged in the furtherance of the business or affairs of the defendant, because he had quit work and was on his way home, still his injuries were "caused by the operation of defendant's business or affairs thereon," to-wit: the operation of the train of cars. The injuries were "sustained by the employe, who, though not so engaged, was injured upon the premises occupied by or under the control of the employer", or upon which its business was being carried on, and the employe's presence thereon was required by the nature of his employment. This brings the case directly within the purview of Section 301 of the Act, even if he were not at the time he was injured "actually engaged in the furtherance of the business or affairs of the employer".

The facts that he was negligent; that there was a safer way; that he had been warned not to board the moving cars, are immaterial. There is no evidence that the injury or death was intentionally self-inflicted, which alone will relieve the employer from liability if the other ingredients are present.

We cannot distinguish this case from *Gurski v. Susquehanna Coal Company*, decided by Judge Strauss and affirmed by the Supreme Court on appeal, reported in 4 D. R. 1472, Judge Strauss' opinion being reported in 4 D. R. 521, except that in the Gurski case the accident happened during working hours.

Judgment of the compensation board is reversed and judgment is directed to be entered in favor of the claimant and against the defendant, and compensation is allowed in the sum of \$6.82 per week for 300 weeks, beginning August 3, 1917, and in addition the sum of \$100.00 for burial expenses and for the costs of appeal.

R. J. Dever, for claimant.

N. Dano, Jr., J. T. Lenahan, for defendant.

BROWN *v.* JUDGE.

Replevin—Acts 1905, P. L. 163, and 1901—Goods impounded with parties in the controversy.

Act April 14, 1905, P. L. 163, amending Act April 19, 1901, relating to replevin and impounding goods with parties in the controversy, contemplates goods having sentimental value, such as heirlooms, pictures, etc., or antiques having uncertain value, but these Acts do not contemplate impounding household goods, except in hands of third party, and looking to their preservation in present status.

Replevin. Rule to set aside order impounding the property with the plaintiff. Common Pleas, Luzerne county. No. 283, July term, 1919.

STRAUSS, J., December 3, 1919.—This is an action of replevin in which the defendant had given a counter-bond on May 31, 1919, and retained the goods.

On June 2 the plaintiff presented a petition to the motion judge (Judge Garman) setting out that the actual pecuniary value of the property will not compensate her therefor; that many of the articles in question were bequeathed to defendant by Mary M. Judge, who for some years stood in *loco parentis* to the deponent, and that the love and affection which the defendant had for the said Mary M. Judge enhances the value of the said property beyond any pecuniary value, so that the actual pecuniary value cannot and will not compensate her for loss thereof; that the remaining articles were bought by deponent herself with her own money or are gifts of plaintiff's, including photographs of friends, the loss of which cannot be compensated in money; that an estimate of the probable cost and necessary charges and expenses of the storage pending final determination is annually \$36.00, and that deponent is ready and willing to furnish such bond to secure the payment of such charges and expenses as the Court may require and shall approve. Thereupon the said judge made an order directing the impounding of the property in the custody of the plaintiff. This action was intended to be in compliance with the Act of April 14, 1905, P. L. 163, amending the Act of April 19, 1901, relating to replevin, which provides that when by affidavit it is averred that "by reason of the nature of the property (replevied), or of any special circumstances connected with the alleged ownership thereof the actual pecuniary value of such property will not compensate the plaintiff for loss thereof, the

Court or, in vacation time, any judge thereof at chambers, shall order such property to be impounded in the custody of the sheriff or such other person as the Court * * * may designate, to abide the final determination of the action," upon payment or security for the payment of the charges or expenses that may have to be incurred for such impounding.

On June 13 a rule was obtained on the plaintiff to show cause why the foregoing order of June 2 should not be revoked. The case was duly argued before Judge Garman and the undersigned at argument court, with result that after consultation with one another, we have concluded to modify the order of June 2 impounding the property in the custody of the plaintiff, and to direct that the property shall be impounded in the custody of the sheriff if the plaintiff will file a bond as required by the statute to provide for the costs of storage.

A careful consideration of the statute has led us to the opinion that except perhaps the pictures or photographs mentioned in the writ, none of the property is of the character which was contemplated by the statute. Personal property having sentimental value, like heirlooms and family pictures, were undoubtedly intended to be covered; other property, *e. g.*, original paintings by great masters that have great but uncertain monetary value, antiques of various kinds that have special but uncertain value because they are sought by collectors would undoubtedly come within the category. But even though in the broad language of the statute household property, such as makes up the mass of the goods in dispute, might be impounded under certain conditions, they ought never to be impounded with either of the parties to the controversy. In our opinion the statute only contemplated the delivery of the goods into the hands of some impartial third person, preferably the sheriff, who would preserve them in their present status or condition, and who would not subject them to ordinary household wear, as will be the case undoubtedly here if the goods are left with the plaintiff. The purpose of the Act being the preservation of the goods exactly as they are at the time when the suit is instituted, that purpose might be violated as the result of such an order as was made in this case.

Plaintiff is directed to surrender the property to the sheriff, with whom the same shall be impounded, and to furnish a bond to be approved by the Court in the sum of \$100.00, conditioned for the payment of all storage costs during the pendency of the action; otherwise, on failure to deliver such bond, the goods shall be delivered by the sheriff to the defendant, who has filed a counter-bond required by statute, which counter-bond was duly approved by this Court on May 31, 1919.

S. M. R. O'Hara, A. Salsburg, for plaintiff.
M. J. Mulhall, for defendant.

NATIONAL CASH REGISTER CO. v. BURBA.

Bailment—Leasing of machine—Statement—Demurrer.

Where in suit on contract for purchase of cash register, plaintiff confuses terms of contract as to leasing the machine, and the right to purchase at expiration of term, demurrer will be sustained. Defendant is entitled before affidavit of defense to a statement technically correct.

Action assumpsit. Plaintiff's statement, demurrer, and motion to dismiss demurrer. Common Pleas, Luzerne county. No. 417, March term, 1919.

STRAUSS, J., December 1, 1919.—The plaintiff has filed a statement in which it avers that on April 30, 1913, the defendant entered into a written contract with it for the purchase of a cash register, No. 442, valued at \$275, subject to a credit of \$62.50, to be obtained upon the delivery to the plaintiff by defendant of two other cash registers which, however, were not delivered. The suit is, therefore, according to paragraph 9, for \$192.50 plus \$62.50 aforesaid, or a total of \$255.00. The tenth paragraph avers that a true and correct copy of the contract is attached.

The demurrer sets out that "the plaintiff's statement is not such a statement whereto defendant can properly be called to file an affidavit of defense, for the reason that it is self-contradictory and alternately alleges the plaintiff's claim is founded upon a contract of purchase and a lease."

Upon examining the copy of the contract we fail to find any agreement to sell the register for \$275 or even for \$255. The only reference to a right on the part of the defendant to buy a machine is contained in the following words:

"At the expiration of the rental term the undersigned (the defendant) agrees to surrender said cash register to you (the plaintiff) in as good condition as when delivered, excepting damage caused by reasonable wear, whereupon you are to return the amount paid by you as a deposit, provided all the terms of this lease have been complied with, undersigned to have the option, after surrendering said register, to purchase the same upon a payment to you of the amount to be deposited as partial security."

The rest of the agreement concerns itself with a leasing of the machine to the defendant at a total rental of \$255, payable in eight monthly instalments of \$20 each, and one instalment of \$32.50, and also a payment of "\$20 forthwith and upon arrival of said register, as a deposit to partially secure a fulfilment of this agreement on the part of the undersigned;" and with a credit of \$62.50 for two cash registers, as already stated, said credit allowed to apply on rental.

While the plaintiff may have the right to recover for the rental that remains due upon the contract, and may have the right also to recover damages for non-fulfilment of the contract to surrender

two old machines as part payment of rental, the defendant is entitled to have the statement technically right in its averments, and as it is now, it utterly confuses the two sections of the contract, the leasing of the machine and the right to buy the machine after it has been surrendered at the end of the term. The demurrer is sustained.

Demurrer sustained, without prejudice to plaintiff's right to file a new statement, and thereupon to demand in due course another affidavit of defense.

Reynolds & Reynolds, for plaintiff.
W. J. Trembath, for defendant.

INT. CLAY MACH. CO. v. KEYSTONE CLAY CO.

Practice—Goods sold and delivered—Statement—Particularity—Affidavit of defense—Contract.

Action on book account is clearly an action on contract where goods were bought by correspondence, and statement should include copies of correspondence. Where statement is limited merely to averment that goods were delivered but fails to state to whom delivered for carriage, averment in affidavit of defense that goods were not received will be sufficient.

Application for judgment for want of a sufficient affidavit of defense. Common Pleas, Luzerne county. No. 682, March term, 1919.

STRAUSS, J., December 22, 1919.—The first averment in the affidavit of defense is that "the plaintiff is not entitled to recover on statement of claim filed in the case, in that he fails to show that the contract made was oral or in writing according to the demands of the Practice Act."

The statement avers that "plaintiff is a Maine corporation; the defendant a Pennsylvania corporation. * * * The defendant is justly and legally indebted to the plaintiff in the sum of \$190.25 * * * for goods sold and delivered to defendant at special instance and request upon an account hereto attached and made part hereof. Said account is a true and correct copy of plaintiff's book of original entries."

The Practice Act, 1915, provides that "the statement of claim shall be as brief as the nature of the case will admit. In actions on contracts it shall state whether the contract was oral or in writing."

The plaintiff has referred us to Bartlett v. Kaier, 15 Schuylkill Leg. Rec. 81, where in a similar proceeding it was stated: "This is an action upon a book account. It is not an action upon an express agreement, either oral or written, and therefore does not fall within the provisions of Section 9 of the Practice Act of 1915."

We cannot agree with the above. An action on a book account

is clearly on contract. The statute does not distinguish between an express and an implied but only between an oral and a written contract. As the question involved is one of correct practice, this case has been submitted to all of the judges of this court for their opinion, and they agree that the requirement of the statute must be observed, and the statement should clearly set out whether the contract in suit was oral or in writing. A purchase over the counter at a store makes an oral contract. A purchase by correspondence makes a written contract. In the case before us where the parties are located far apart, as Dayton, Ohio, and Wyoming, Pa., the probabilities in favor of a written contract are strong. If the contract were in writing, then under Section 5 of the same Act "copies of all notes, contracts, book entries, must be attached to the statement. This would probably include copies of the correspondence from which the contract arose. We, therefore, have concluded that the plaintiff's statement is insufficient.

In order to avoid unnecessary delays in this litigation hereafter, we have examined the affidavit of defense upon its merits. It fails to set out that the affiant, being the president of the defendant company, on behalf of the defendant company, avers expectation to prove upon trial of the case the non-delivery of the goods. The statement itself failing to show how the goods were delivered, but being limited to an averment of delivery only, is sufficiently denied by an averment in the affidavit of defense that the goods were not received by the defendant. Had the plaintiff averred delivery to a carrier, the mere assertion that defendant did not receive the goods would not be sufficient. The papers attached to this statement as copies of the book account are eight separate bills, having the words "Adams Express" on some and "P. R. R." on others, from which we conclude that the plaintiff is ready to aver delivery to carriers.

While we shall always favor a construction of the Practice Act free from useless technicalities, we are still of the opinion that essential averments that will tend to bring to issue the real question in dispute should not be omitted from the statement. Such practice will not be open to the criticism that it means restablishing the evils that marked common law special pleadings. On the contrary, exactness and exhaustiveness in averments of the facts on which plaintiff must rely for his right to recover, should necessarily be followed by similar exactness in the affidavit of defense, and thereby produce certainty in the issue where the affidavit contains sufficient averments of defense.

Motion for judgment for want of a sufficient affidavit is denied, plaintiff to be permitted to file a new statement and thereupon to demand another affidavit of defense within fifteen days after filing of the new statement.

J. P. Harris, W. H. Goodwin, for plaintiff.
Stanley Kuryloski, for defendant.

FOSTER *v.* PENN'A MUTUAL LIFE INS. CO.

Contract—Examinations for life insurance—Severable contract—Physician.
Where physician brings suit against life insurance company for examination of applicants for insurance, contract specifying different examination rates for different classes of insurance amounts, and affidavit of defense admits a certain total as just, but avers false returns in four cases, the contract will be adjudged as severable and the plaintiff will be awarded the value of service in which there was no default.

Affidavit of defense and exceptions. Common Pleas, Luzerne county. No. 915, May term, 1916.

STRAUSS, J., December 30, 1919.—The plaintiff, a physician, sued the defendant for \$220.30, being for his services as medical examiner under contract that his compensation should be thirty-five cents for each examination for application for less than \$500 of insurance; one dollar for applications between \$500 and \$1,000; two dollars for all applications above \$1,000, and for children applicants twenty-five cents each.

The itemized bill appended give the dates and the total becoming due upon each date for examinations but does not separate the examinations made from one another according to the fee payable. Thus, the first item, September 6, 1915, is \$9, without showing how many fees at twenty-five cents or at thirty-five cents or at one dollar or of two dollars are included. The affidavit of defense, however, admits that the total services charged for in the statement, \$220.30, were furnished, excepting that in four particular instances the plaintiff knowingly and falsely certified the result of his examination. As the cause of these false certificates, in four instances the defendant avers plaintiff's lack of fidelity, and, therefore, contends that he has forfeited the right to any compensation for services.

The contract is a severable one, and the defense, if well founded in fact, is undoubtedly good as to four examinations; but we are of opinion that without other averment than that contained in the affidavit, the defense cannot be maintained as against the several items in which there was no default in service. Giving the defendant the benefit of every doubt and assuming that each of the four cases involved a fee of two dollars, though the affidavit is silent as to the amount involved in these cases, the plaintiff is entitled to recover at least \$212.30.

Exception to the affidavit of defense is dismissed, except as to eight dollars, and judgment is directed for want of sufficient affidavit of defense for \$212.30, with interest.

J. P. Harris, for plaintiff.

M. J. Mulhall, for defendant.

BOWER v. BALTIMORE LIFE INS. CO.

Insurance, life—False statements in application for insurance—Evidence—Weight of—Province of jury.

Where in suit by children of first wife on insurance policy held by father of plaintiffs, defense is based on false representations as to health, etc., on application for insurance, second wife testifying that deceased had been frequently ill and had employed several physicians, and had used intoxicating liquors, and this offset by testimony of children who were constantly at home—that the father was never ill before insurance application, and never used liquor, and no physicians are called to substantiate allegation of frequent medical attendance, and verdict is for plaintiff, new trial and judgment *n. o. v.* will be refused.

Common Pleas, Luzerne county. No. 1296, October term, 1913.

O'BOYLE, J., February 20, 1920.—In the above entitled case, a policy of insurance was issued to the plaintiff, Margaret Bower, on the life of her brother, Thomas F. Mullen, by the defendant, the Baltimore Life Insurance Company, and, upon his death, a suit was brought by her, she being the beneficiary, to recover \$258 as the amount due her on said life insurance policy.

The theories upon which the company based its defense were:

First: On the ground of false statements which the deceased is alleged to have made in his application for insurance, concerning the condition of his health.

Second: Whether he used intoxicating liquors, and whether he had been sick, or frequently attended by a physician.

Third: Because the man that the Company insured, lived in Wilkes-Barre, and the man who died lived in Pittston.

In support of the contention of the defendant, one witnesss who had been the second wife of the deceased, but who married after his death a Mr. John Surry, testified that previous to the issuance of the insurance policy in question, applicant for insurance had been sick, and had used intoxicating liquors, and had been attended by physicians, who were not designated by him in his answers to the questions contained in the application upon which the policy of insurance was based.

In rebuttal of this testimony, a son and daughter of the deceased, both of whom were living at home, testified that their father, at the time of his application for said insurance, did not drink intoxicating liquors, was in good health, and never had been attended by a physician.

It seems the boy lived at home, worked during the day time,

and, the defense insists because of this, absence from home during working hours, it was negative testimony; and, that while he returned every night, and left in the morning, the father might have been sick and in ill health, without the son's knowledge of it, and therefore, that his testimony was not a contradiction of the testimony of Mrs. Mullen (afterwards Mrs. Curry), who was at home practically all the time.

It also appears that the daughter went to school, and, in her testimony she states that she left home about nine o'clock in the morning, returned about twelve, at noon, left for school again at two, and returned at four. Yet, notwithstanding, that this course of living, on the part of the children, continued for several years, it is contended this is not sufficient to contradict the testimony of Mrs. Curry, who states that he was sick and had doctors to attend him.

It certainly seems to us that where the family relationship was as close as has been indicated here, it was a question for the jury to determine which side of the case was the more believable; and, doubtless, in taking into consideration the truth of the stories told, the jury may, in some manner, have wondered what prompted Mrs. Curry to testify against the children of her deceased husband.

It is also strange, that in view of the fact that the defendant company had this important testimony of Mrs. Curry, and that she testified to the fact that certain doctors, naming them, had prescribed for him, that no attending physician had been called by it to disprove the answers in the application for insurance, or contradict the testimony of his two children, as neither of them had any conflicting interest.

This case now comes before us on motions for judgment *non obstante veredicto*, and also for a new trial; and the complaint is made that notwithstanding this conflicting testimony, the case should not have been submitted to the jury, and that binding instructions should have been given.

It has been held that the case is for the jury where the defense is false statements of deceased, whether he had suffered from certain ailments and knew of their existence, or whether they were of a kind he might have had without being aware of the fact.

In the case of *Oplinger v. New York Life Insurance Co.*, 252 Pa., page 328, it is stated:

"In an action on a life insurance policy brought by the beneficiary named therein, the defense was that deceased had made false statements in his application as to the state of his health, and the testimony as to the verity of the statements made by the insured was conflicting.

"The trial judge excluded evidence of declarations made by the insured concerning the state of his health after the policy was issued, and charged that if the insured, prior to his application suffered from designated ailments of whose character he would surely be cognizant, then the verdict must be for the defendant; but that if he suffered from certain other ailments of a kind he might have had without being aware of the fact, then the good faith of his answers would depend upon his knowledge.

"The jury found a verdict for the plaintiff, upon which judgment was entered. Held, no error."

The fact that the examining physician, who represented the defendant company, certified on the application that the deceased was in good health, and he also testified upon the witness stand that he had known the applicant for some time previous to his application for insurance, should, of itself, carry the case to the jury, notwithstanding the testimony of Mrs. Curry.

As to the contradiction of statements made in an application for insurance, it has been held in the case of *Clark v. Metropolitan Life Insurance Co.*, 62 Pa. Superior Court, page 192, that:

"In an action on a policy of life insurance where the plaintiff presents a *prima facie* case, and the defendant sets up false representations as to health, in the application, the testimony of a physician which is directly contrary to the statement in the application, is not necessarily to be believed, although it is uncontradicted, and the case must be submitted to the jury to pass upon the credibility of the witness.

"The condition of health of an insured at a particular time is usually, and almost necessarily, a question of fact to be submitted to the jury, under proper instructions."

It has been held, that where the insurance company denies all responsibility, and refuses to pay anything, as indicated by the affidavit of defense filed in this case, such a defense amounts to a waiver of notice and proofs of death.

This doctrine is laid down in the case of *White v. Empire State Degree of Honor*, 47 Superior Court, page 52, wherein it is stated:

"Where an insurance company is notified of the death of an insured, and denies all liability on the ground that the insured committed suicide, such denial amounts to a waiver of further notice and proofs of death".

This principle is also enunciated in the case of *Wakely v. Sun Insurance Office*, reported in 246 Pa. at page 268, wherein it is stated:

"Where proofs of loss are delivered to an insurance company within the time stipulated in the policy, in good faith as a compliance with the provisions of the policy, it is the duty of the company to give immediate notice to the assured of its objections to the proofs, if any, pointing out the defects, and if the company neglects to do so, its silence will be held as a waiver of such defects in the proofs."

It was shown clearly by indisputable evidence at the time of the trial, that the man insured was identical with the man who died, and that there was no mistake in the identification of the person designated.

In the case of *Dalmas, appellant, v. Kemble*, 215 Pa., page 410, it was held, that:

"Under the Act of April 22, 1905, P. L. 286, which gives the court authority to enter judgment *non obstante veredicto*, where a request for binding instructions has been declined at the trial, the Court cannot enter judgment *non obstante veredicto*, where there was a conflict of evidence on a material fact, or any reason why there could not have been a binding direction."

And, in the case of *Strawbridge v. Hawthorn*, 47 Superior Court, page 647, it is stated, that:

"In determining as to the correctness of a judgment *n. o. v.*, under the Act of April 22, 1905, P. L. 286, the test is whether binding direction for the defendant would have been proper at the close of the trial. In applying the test, the plaintiff must be given the benefit of every fact and inference of fact pertinent to the issue, which the jury could legitimately find from the evidence before them."

In the case of *Duffy, appellant v. York Haven W. & P. Co.*, reported in 233 Pa. State Reports, at page 11, the following appears:

"In considering the motion for judgment for the defendant *non obstante veredicto*, the defendant's contradictory testimony is eliminated, and the question is whether the evidence submitted, if believed, was sufficient to warrant the jury in finding a verdict for the plaintiffs."

Taking this case, all in all, we are not satisfied that any such error was made as would justify either a new trial, or a judgment *non obstante veredicto*.

Rule for new trial discharged, motion for judgment *n. o. v.*, refused, and rule discharged, and judgment is directed in favor of the plaintiff.

W. L. Pace, for plaintiff.

M. H. McAniff, for defendant.

McAVOY v. DOTTER *et al.*

Equity—Deed—Cancellation—Consideration—Maintenance of aged father.

Where in consideration of natural love and affection and with understanding that a daughter, A, would provide her aged father a home for himself and a weak-minded daughter, B, the father executes deed to a property to said daughter, A, and the father takes up his home as aforesaid, being comfortably provided for, and leaves without valid excuse, the circumstances showing his unwarranted irascibility, and the father prays for cancellation of the deed, averring his belief that he had really made a will, and the transaction showed no circumstance of deception, and the best interests of all concerned appear to be a maintenance of the relation created between father and daughter, cancellation will be refused without prejudice.

Bill, answer and replication. Common Pleas, Luzerne county.
In Equity. No. 2, July term, 1918.

STRAUSS, J., December 30, 1919.—THE BILL avers that prior to November 8, 1917, the plaintiff was the owner of a certain piece of land situate in the City of Pittston, particularly described being about 60 feet in front by 260 feet in depth along one side and 243 feet on the other side; being the same land which was conveyed to him on September 26, 1896, the deed for which is recorded in the recorder's office of Luzerne county in Deed Book No. 309, page 433. On or about October 30, 1917, he went to live with his daughter, Mary Dotter, and her husband Nathan Dotter; that that during about a year before that date his said daughter had solicited and desired him to secure the above described land and premises to her, and promised in return that she would furnish him a good home for the rest of his life and maintain and support him in the same. Relying on these assurances he conveyed this land to her on or about November 8, 1917, by a deed which he at the time of said execution and delivery believed was a will by which he was devising and bequeathing said land to the daughter. Soon after the execution of the deed the daughter by her conduct towards him made life so burdensome and his presence in her home so intolerable that it was impossible for him to remain there and he was forced to withdraw and did withdraw from the house of his daughter and her husband and has not returned, nor has she or her husband contributed anything to his support since he left her house about December 10, 1919. After he withdrew from the home of the defendants, for the reasons above stated, believing that the will that he had executed gave to the defendant control of the land aforesaid, he requested them to maintain and

support him. Upon their refusal to do so he learned upon inquiry that the paper executed as aforesaid was a deed conveying the title and said land for a consideration of one dollar and natural love and affection, and that said deed is now recorded in the recorder's office of Luzerne county; that he before the execution of the deed had requested his daughter to permit R. E. Bowkley, an attorney who was his personal friend, to prepare the paper she desired him to sign, to which the daughter objected and suggested another attorney who was a friend of her husband's. This other attorney prepared the deed at his office, and the plaintiff being without an attorney or anyone to represent him at the time of the execution and delivery of the deed, signed it. The value of the land described is \$2,000 free and clear of all liens and incumbrances. Then follows an averment of irreparable injury, and a prayer that the deed may be declared null and void; that defendants may be ordered to convey by good and sufficient title to the plaintiff the title to the land aforesaid by deed; that pending this bill the defendants be perpetually restrained from disposing of the above described land and premises or conveying or in any way incumbering it.

THE ANSWER admits that the plaintiff was the owner of the land prior to November 8, 1907; that plaintiff went to live with defendants on or about October 30, 1917; that plaintiff is about eighty years of age; that prior to November 8, 1917, the plaintiff had solicited and requested the aid of his daughter not only for himself but also that such aid and attention be given to his daughter, Theresa McAvoy, who was a weak-minded sister of defendant and at the time living with the plaintiff on Lambert street on said property; and that on November 8, after the whole situation had been fully discussed and the whole matter thoroughly understood, it was agreed between the plaintiff and the said Mary Dotter, defendant, that the property should be conveyed to defendant, and in consideration thereof she was to take him to her home and with her family, consisting of her husband, two daughters and one son, furnish him a comfortable home, support him during the remainder of his life, and at the same time take his said daughter, Theresa, to her home and likewise furnish her a comfortable home and support. In pursuance of said agreement and undertaking the deed was accordingly made

and executed in the office of Wm. W. Hall, an attorney of Pittston, and the same was duly recorded and the plaintiff thereupon with his daughter, Theresa, continued to make his home with the said Mary Dotter until he the plaintiff left the home on or about December 10, 1917, of his own free will. While the said plaintiff lived with the defendants he received good and substantial food, a comfortable room and was at all times treated as a member of the family with the utmost respect and deference without being caused any unnecessary annoyance or trouble by the defendants. It is denied that plaintiff thought he was executing a will when in fact he signed the deed with full knowledge of its contents, and she the defendant has always been ready and willing to carry out her part of the understanding and agreement; that she has cared for and maintained said Theresa McAvoy, daughter of the plaintiff, during all said time the plaintiff, Thomas McAvoy, has not to petitioner's knowledge contributed anything to her maintenance and support. Defendant admits that she has failed to support the plaintiff since his withdrawal from her house December 10, 1917, for the reason that he withdrew without reason or cause, and it was understood and agreed originally, November 8, 1917, that the plaintiff was to be supported and maintained at her house and not elsewhere. She denies he understood that the paper he signed was a will, and that it provided for his maintenance and support elsewhere than at her home; that it was upon her own suggestion that they called at the office of Wm. W. Hall where the deed was prepared; that her husband, Nathan Dotter, had nothing whatever to do with the transaction, nor was he present at any time at the discussion of the understanding and agreement, but on the contrary was much opposed to the said Mary Dotter's entering into the agreement aforesaid. She denies that the value of the land is about \$2,000 and avers that the premises do not exceed in value \$1,000; wherefore she prays that the bill may be dismissed.

(The findings of fact 1-5 include fair valuation for the property in issue \$1,000; age of petitioner over 80; tendency of petitioner to arbitrary and irascible temper; estrangement between petitioner and a son, and no communication for a long time between him and several other children; grantor's husband inclined to oppose the arrangement and not a party thereto; and so on to the sixth finding of fact to-wit:)

6. The defendant has not violated her agreement with the plaintiff. The plaintiff left her home without justification by anything which she had done. He is rather irascible and hard to get along with—quite arbitrary in his demands. The conditions in which he finds himself are such that this defendant daughter ought to be encouraged to continue ministering to his wants as she is willing to do. It would be against his own best interests to have this deed set aside and to turn him out to care for himself.

7. The foregoing findings require us to dismiss the bill. We shall do this, however, without prejudice to the right of the plaintiff to renew his application for a reconveyance at any time hereafter, or to substitute for it a petition for an accounting if the property shall have been sold; such application to be made only in case conditions shall hereafter arise which require the Court equitably to intervene in order to protect the plaintiff and to obtain for him a full and fair performance of the conditions on which he made the conveyance.

FINDINGS OF LAW.

1. The plaintiff is not entitled to the relief which he prays for.
2. The bill ought to be dismissed without prejudice however to the right of the plaintiff to renew his application for a reconveyance, or in case the property shall have been sold, for an accounting if conditions shall hereafter arise requiring such remedy for his protection.

DECREE NISI.

The prothonotary is directed to enter the following decree *nisi* and to give notice thereof to the parties and their attorneys in accordance with the equity rules.

Now, December 30, 1919, this cause came on to be heard at this term and was argued by counsel, and upon consideration thereof, it is ordered adjudged and decreed—

(1) That the prayer of the plaintiff as contained in the bill filed in this case, be refused.

(2) That the bill be dismissed without prejudice, however, to the right of the plaintiff to renew his application for a reconveyance or cancellation, or in case of previous sale of the property for an accounting if such an order on the part of the Court shall become necessary for the protection of the plaintiff and performance of the conditions upon which the conveyance was made by him.

(3) That the costs be paid by the plaintiff.

W. I. Hibbs, for plaintiff.

W. W. Hall, for defendants.

KINGAN PROVISION CO. v. MANGANILO BROS.

Assumpsit—Statement—Affidavit—Practice Act—Supplemental affidavit.
Where in suit for goods sold and delivered copy of original book entries are attached to statement and affidavit is made by bookkeeper as one "having knowledge of the facts," the requirements of the Act are met, but where question of law is raised in affidavit of defense that bookkeeper is not qualified to make affidavit, not being an officer of the corporation (plaintiff), permission will be given to file supplemental affidavit.

Motion for judgment for want of sufficient affidavit of defense.
Common Pleas Luzerne county. No. 459, October term, 1919.

STRAUSS, J., February 14, 1920.—This suit is for a balance due on book account for goods sold and delivered. A copy of the book of original entries is attached to the statement, and the affidavit required by the practice act of 1915 is made by a person who describes himself as the bookkeeper for the plaintiff familiar with the facts set forth which he swears are true and correct.

The affidavit of defense raises a question of law in the nature of a demurrer to the statement on the ground that the so-called bookkeeper is not an officer of the plaintiff corporation; that the statement is not sworn to by some person having knowledge of the facts and does not show upon its face that the affiant had knowledge of the facts. Cases are cited wherein affidavits of defense have been held insufficient because not made by the proper person.

The Procedure Act requires a statement to be sworn to "by the plaintiff or some person having knowledge of the facts." In a suit for goods sold and delivered the book of original entries is admissible to prove such sale. *Curran v. Crawford*, 4 S. & R. 2. This case has been cited frequently and followed though not extended.

In Fulton's App. 178 Pa. 87, in line with this precedent it was stated: "Books of original entry are evidence to prove a claim for goods sold and services rendered if made in due course of business, but as they are evidence made by a party for himself and very incapable of being tested by other proof, they are guardedly received, and only to prove sale or delivery or labor for the alleged debtor for which the law implies a promise to pay."

If these books were produced in court it would be necessary to prove them by the bookkeeper who presumably made the entries

therein, and there is therefore no good reason for holding that the bookkeeper who thus must become a witness at the trial is not the person who may make the affidavit to the statement, especially so when in the affidavit he states that he is familiar with the facts set forth in the statement.

As the question raised is one of law we may not enter judgment for the plaintiff for want of sufficient affidavit of defense, but as we decide the question of law raised by the defendants against the defendants, we are required by section 20 of the Practice Act of 1915 to give defendants an opportunity to file a supplemental affidavit of defense within fifteen days.

Question of law raised by the affidavit of defense is decided against the defendant. He may file a supplemental affidavit of defense to the averments of fact in the statement within fifteen days.

Reynolds & Reynolds, for plaintiff.
F. L. Pinola, for defendants.

AHERN *v.* THE STANDARD REALTY CO.

Landlord and tenant—Arrears of rent—Confession of judgment—Attorney—Praecept.

1. Confession of judgment for rent arrears is an agreement collateral to covenants of lease giving security for rent. Judgment by confession in pursuance of warrant of attorney must be self-sustaining, and person against whom such judgment is entered must have confessed it or it cannot be entered against him.
2. Thus where A and B, lessor and lessee assent to assignment of lease to C, C's acceptance of terms "according to full tenor and effect" without having ever signed warrant of attorney to confess judgment gives prothonotary no standing to enter judgment merely upon praecipe.

*Rule to strike off judgment. Common Pleas Luzerne county.
No. 991, December term, 1919.*

STRAUSS, J., February 14, 1920.—On October 24, 1912, M. J. Ahern, now deceased, whose heirs are the plaintiffs in this case, executed as lessor, a lease for certain premises in Wilkes-Barre city to William B. McGuire at a rental of \$2100 per year for a term of ten years and five months with the usual covenants against assignments or subletting and with a confession of judgment by the lessee in favor of the lessors for \$21,875 the full amount of rent for the entire term, and covenant that upon violation of terms the whole rent should become due. This lease was duly signed by the lessor and by the lessee and has endorsed upon it, as of the same date, "I hereby assent to the assignment of this lease to the Standard Realty Company with right in the latter to sublet to tenant suitable to me and for any other lawful purpose if license refused. (Signed) M. J. Ahern and William

B. McGuire." It is evident that the signature of McGuire was added for the purpose of consummating the assignment. Another endorsement appears on the lease in the following terms: "Now, October 31, 1912, the Standard Realty Company hereby accepts this lease according to its full tenor and effect."

November 20, 1919, the plaintiffs caused to be attached to this lease a suggestion of death of Ahern and substitution of his heirs as plaintiffs, together with a suggestion also that in his lifetime Ahern had conveyed a half interest undivided in the premises to the Standard Realty Company.

Another paper, called an affidavit of default, was also attached to the lease setting out that the Standard Realty Company had accepted, according to its full tenor and effect, the said lease and had defaulted in the payment of rentals thereunder, having neglected and refused to pay since March 15, 1919, the sum of \$1487.50, whereby under the terms of the lease there becomes due and payable to the plaintiff from the Realty Company the entire balance due for the term, to-wit, to March 31, 1923, being the sum of \$8487.50, together with attorney's commissions and costs, and a praecipe signed by the attorney for plaintiff directing "judgment to be entered on the within lease for the sum of \$9,336.25, being rent and interest down to November 20, 1919."

The lease with these other papers attached was filed in the prothonotary's office, and the prothonotary without other warrant than appears in the praecipe aforesaid, entered a judgment as upon confession against the Standard Realty Company.

An inspection of the papers discloses that the warrant of attorney contained in the lease has never been signed by the Standard Realty Company, nor has any authority been given to any attorney by the Standard Realty Company to appear for the said company and to confess a judgment in its name in favor of the lessor. In fact the only justification suggested by the plaintiff for this proceeding and for the judgment against the company is the endorsement upon the lease dated October 31, 1912, whereby as already stated "the Realty Company hereby accepts this lease according to its full tenor and effect."

It has been ruled many times that a judgment by confession, in pursuance of a warrant of attorney, must be self-sustaining and the person against whom such judgment is entered must have confessed it or it cannot be entered against him. *Stewart v. Lawson*, 181 Pa. 549. *Ganz v. Morrett*, 31 Lanc. Rev. 9. *Benz v. Langan*, 5 Northampton 139.

The confession of judgment for the amount of the rent contained in the lease is in fact no part of what technically makes the lease, but is only an agreement collateral to the covenants of the lease giving security for the rent. It was held in *Smith v. Pringle*, 100 Pa. 275, that "a confession of judgment in a lease

for a term certain has reference to the rent for that particular term only, and does not authorize the entry of judgment for rent accruing after the expiration of the term where the tenant has held over."

No doubt all the covenants relating to the enjoyment of the land, of the rents, the manner and terms of payment, occupancy, etc., would bind the hold-over tenant, but the confession of judgment is by this decision limited to the term originally created. So it was held that while a confession of judgment in ejectment contained in a lease runs with the land and therefore may be enforced against a sub-tenant by a writ of *habere facias* entered against and on the confession of the original tenant, yet it does not authorize the entry of a judgment against the sub-tenant by name, he never having signed the original lease. A confession of judgment in ejectment contained in the lease is to be distinguished from a confession of judgment for a definite sum of money to secure the rent; the one affects the land itself and therefore runs with it; the other is a mere liquidation of a debt for rent and as such is collectible from the debtor as any other of his debts similarly secured might be. The lessee by conferring contractually this additional remedy does not thereby detract from or impair the lessor's other remedies by landlord's warrant or ejectment. The one may be enforced against the land and consequently against any occupant upon the land—the other may only be enforced against the defendant who signed the confession of judgment. That the assignment of the lease was in writing accepted by the assignee "according to its full tenor and effect," adds nothing of substance to the lessor's or lessee's rights which either would not have been entitled to had the assignee simply taken possession under a verbal assignment and entered upon enjoyment of the term. If the confession of judgment for the rent would not have been attributable to the assignee as a result of such verbal assignment followed by entry, possession and acknowledgment of the lessor's title to the rent, it will not be attributable to him simply by construction of the words "according to its full tenor and effect" in the writing. Such assignment, whether verbal or written, without more is necessarily according to the full tenor and effect of the lease.

We have carefully considered the very earnest and analytical argument contained in the plaintiff's brief and the many authorities therein cited and have concluded that none of them vary or weaken the principles so clearly stated in *Stewart v. Lawson, supra*, followed in the later cases.

Rule to show cause why the judgment shall not be stricken from the record is made absolute.

Frank P. Slattery, Esq., for plaintiffs.
Hon. J. T. Lenahan, for defendant.

DRUM *v.* DINKELACKER.*Equity—Jurisdiction—Injunction—Right of way—Practice.*

Where after bill for injunction against blocking up a right of way, defendant denied jurisdiction of equity and requested certification to law side under Act 1907, met denial and later renewed request for issue, and again at final hearing asked for issue, Supreme Court having decided that refusal to certify was interlocutory and not subject of appeal, defendant, protected by interlocutory decree and entitled to adjudication of preliminary question has no remedy except to raise the question at final hearing. Under circumstances, *supra*, certification to law side, and issue, is to be regarded as good practice in the absence of other procedure provided by statute or rule of court.

Bill, answer, replication and final hearing. Exceptions to decree nisi. Common Pleas, Luzerne county. In Equity.

STRAUSS, J., January 20, 1920.—It is clearly established:

1. The bill in this case was filed May 10, 1916.
2. There are disputed facts relating to the existence of the controverted right of way.
3. On May 16, 1916, when a motion to continue the preliminary injunction was before the Court, the defendant *in limine* denied the jurisdiction in equity, and requested the Court to certify the case to the law side under the Act of 1907. (See 9th reason for dissolving the preliminary injunction.)
4. This motion was promptly denied by the Court.
5. On June 6, 1916, the defendant by answer filed again denied the jurisdiction in equity and asked for an issue to try the questions *in limine* and that after decision of said issue the case be certified to the law side. (See 15th paragraph of answer).
6. At the beginning of the final hearing on the bill, answer and replication, January 8, 1919, the defendant renewed the objection to the jurisdiction and put upon the record the following statement:

“Now, January 8, 1919, the defendant through his counsel respectfully renews his challenge to the jurisdiction of the court in this case as heretofore he challenged the same at the hearing on the motion to continue the preliminary injunction, and by answer filed in writing to the bill of complaint, and he now requests that the question of jurisdiction be determined *in limine* before hearing upon the general merits of the case; and he further requests that the case be certified to the Court of Common Pleas and that an issue be there framed to try the questions of fact involved in this case by jury according to the course of common law.”

Notwithstanding these persistent efforts on the part of the defendant to have the Court adjudicate against jurisdiction in equity, the plaintiff has filed exceptions to a certification of the case on the ground that the question was not raised as provided by law;

that it was decided before the day of the final hearing; and that it is too late to raise the question on the final hearing.

Considering that it had been decided in this very case by the Supreme Court on appeal from the action of this Court in continuing the preliminary injunction, that the refusal to certify is interlocutory and not the subject of appeal, there was nothing left for the defendant to do but to raise the question again at the final hearing. When it was thus raised it became the duty of the Court to consider it. We have no discretion in the matter. The defendant is entitled to have a final adjudication of this preliminary question so that he may present it on appeal to the Supreme Court. His rights have not been protected by the interlocutory judgment heretofore entered. Being of opinion that the question has been raised as provided by law, that the decision heretofore made does not relieve us from the duty of making a final decision, and that the question was raised in time by the answer filed June 6, 1916, we dismiss the above exceptions.

There is also an exception to the decree on the ground that "the undisputed evidence produced established the fact that the plaintiffs and their predecessors in title used the lane between the property of the plaintiffs and defendant for a period of over thirty years, prior to 1907, and the user of the lane since that date by the defendant, even though an exclusive user, which was denied by the plaintiffs, would not deprive plaintiffs of their right to the lane."

This involves the main issue of fact in the case. When the injunction was granted the defendant was in the actual and exclusive possession of a portion of the disputed land by having built upon it a garage. The order granting a mandatory preliminary injunction having been reversed by the Supreme Court, he is left in possession and the way is interrupted. Therefore the bill itself is in the nature of an ejectment bill. We cannot say that the undisputed evidence shows that even prior to the erection of a garage, the plaintiffs were in undisputed possession of the way during the time named. There is conflicting evidence.

Even before the Act of 1907, permitting the question of jurisdiction to be raised *in limine* and requiring it to be decided, in cases like this the court of equity not infrequently required the plaintiff to go into the law courts and establish his rights, the court retaining the bill for a definite period in order that such right might meanwhile be established. 2 Daniell Chancery Practice, Perkins Ed. 1013; and in the same work Vol. 3, at page 2334, we find a form for an issue to be certified to the law side where a right of way was involved.

Therefore whether the disposition of this case be regarded from the standpoint of accepted equity practice before the Act of 1907, or practice under the Act of 1907, we are of opinion that the

disposition made by certifying the case to the law side and framing an issue is good practice in the absence of a different form of procedure prescribed by statute or by rule of court.

Exceptions dismissed and order of July 28, 1919, confirmed absolutely.

W. C. Price, E. E. Jones, P. L. Drum, for plaintiffs.
Rush Trescott, R. J. Dever, for defendants.

WICHNER v. SOLOMON.

Landlord and tenant—Lease—Covenants—Licensed saloon—Re-possession.

Where premises are leased for sale of liquors, with condition that if lessee does not conduct licensed saloon the lessor may re-enter, and that in event of intoxicating liquors not sold lessee is entitled to a \$20 per month allowance in rent, and lessee fails to take out license, lessor is entitled to re-possess. Tenant would be under obligation at risk of his right of possession to maintain a license so that sale of non-intoxicating, and, therefore, non-prohibited, beverages might be lawfully conducted.

Case stated. Common Pleas, Luzerne county. No. —, March term, 1920.

STRAUSS, J., February 14, 1920.—This case submits to the Court the construction of a lease for premises in the city of Wilkes-Barre containing a special condition that:

“In event the lessee does not run said premises as a licensed saloon, the lessor has the right to immediately take possession of the same, transfer the license to a responsible and proper party, rent the premises to such new licensed party.”

The lease contains a confession of judgment in ejectment a provision that for breach of covenant the lessor may re-enter upon the premises, expel and remove the tenant, and that the lessor may immediately sue out a writ of *habere facias possessionem* in ejectment whenever he has the right to make re-entry.

The defendant has failed to make payment of the instalment of license fee which became due on the first day of February, and by such action has caused a termination of the “license and all right therein.” Act of February 26, 1919. He has thereby broken the above covenant unless his contention should prevail that by reason of national prohibition a liquor license under Pennsylvania law has become null and void, or unless he is excused from complying with said covenant by the following covenant also contained in the lease:

“In the event that no intoxicating liquors or beer is permitted to be sold in Pennsylvania, said lessee will be entitled to an allowance of \$20 a month commencing from the date such law forbidding the sale of intoxicating liquor or beer goes into effect.”

We are clearly of the opinion that the first ground cannot be maintained and that under the Pennsylvania Statute the sale at retail of vinous, spirituous, malt or brewed liquors, even though they contain less than one-half of one per cent. of alcohol, is still unlawful unless authorized by a license under the Act of May 13, 1887, P. L. 108. We make this statement after consultation with our colleagues.

The license Act of 1887 drew no distinction between alcoholic and non-alcoholic vinous, malt or brewed liquors and did not regard the quantity of alcohol that might be contained in them. The Act of Congress for the enforcement of the prohibition amendment has divided such liquors into two classes; one containing less than one-half of one per cent. and the other containing more of alcohol. The Pennsylvania Statute covered both classes and now, since the Act of Congress forbids the sale of the one, remains applicable only to the other.

The plaintiff in this case was entitled under the contract to have the business upon the premises so conducted that the license would be preserved and therefore it was the defendant's duty to pay the February license fee. It may well be that after paying such license fee a fair construction of the second covenant would justify the tenant in claiming the reduction of \$20 per month upon the rent. Such a claim would be justified if the words in the second covenant "intoxicating liquors or beer" were interpreted to mean "intoxicating liquors or intoxicating beer," and this interpretation would seem reasonable. The sale of intoxicants has been since January 16, 1920, prohibited by Act of Congress; but though this be so the tenant was still under obligation at the risk of losing his right of possession to maintain the license so that the sale of non-intoxicant, therefore non-prohibited vinous, malt or brewed beverages might be lawfully conducted.

The case stated informs us that the plaintiff has issued a writ of *habere facias possessionem*, and that thereupon the parties have agreed to submit the question to the Court "as if a rule to show cause why judgment in ejectment shall not be stricken off had been granted, returnable forthwith; wherefore if the Court be of the opinion that the lessee by his failure to take up the license and run the saloon breached the covenants of the lease, the rule shall be discharged, otherwise the rule shall be made absolute." Our opinion is adverse to the defendant's claim, and we sustain the plaintiff's contention that he is entitled to repossess the premises.

Judgment in favor of the plaintiff, and the rule to strike off the judgment in ejectment is discharged.

F. P. Slattery, for plaintiff.

J. H. Shea, for defendant.

KOMAR v. PENNSYLVANIA COAL CO.

Practice—Summons—Mine foreman.

Where service of summons on a coal company is made upon a mine foreman of the company, it does not answer the requirements of the statute, and there is no proper service.

Certiorari. Common Pleas Luzerne county. No. 47, December term, 1919.

STRAUSS, J., January 20, 1920.—This summons was issued on August 4, 1919, was made returnable August 14, 1919, more than eight days after its date. The transcript shows it was "served on the superintendent of the defendant company, Hiram Broom, by leaving a true and attested copy of the original summons with him and informing him of the contents thereof," but the return endorsed upon the summons, is "served on the defendant August 6, 1919, by handing a true and attested copy to him personally."

At the hearing which was held on August 14, Hiram Broom appeared, according to the transcript, "representing the Pennsylvania Coal Company." The transcript then proceeds:

"After hearing a part of the case in which the defendant acknowledges that they the said company is indebted to the plaintiff for some of the money sued for, and that they will pay the said plaintiff in a short time, the case was continued until September 12, 1919, so that the defendant coal company would have a certain time to pay the same. Now, September 12, 1919, the defendant did not appear and at 7 o'clock p. m., judgment was duly entered against the defendant for the sum of \$53.95 and the costs of the proceeding, \$7.25, making a total of \$61.20."

Depositions have been taken which show that Hiram Broom was not the superintendent of the company but a mine foreman. He is neither president, secretary, cashier, chief clerk, or other executive officer of the defendant, nor is he a clerk or employe through whom the defendant company may be served under any Act of Assembly. Therefore whether we regard the transcript or the return endorsed upon the summons, there is no proper service upon this defendant. Moreover, the adjournment to September 12 was not to any particular hour. There is no record of any default at any particular hour, or that the defendant had notice that a hearing would be had at any particular hour. The proceedings must therefore be reversed.

Exceptions are sustained and the proceedings are reversed.

J. P. Harris, for defendant.

Department of Labor and Industry.

BACCHETTI *v.* DIRECTOR GEN'L RAILROADS.

Workmen's Compensation Act—Employe injured outside area of employment—Employe's mistake as to time.

1. Where one employed as cleaner in round house, confused as to time of day, takes a short cut across a bridge which would bring him to his work long before customary time of arrival, the bridge not in the area of his employment, and while going across he is overcome by fumes of locomotive passing underneath, and falls from bridge, sustaining fracture which requires amputation of leg, he is not entitled to compensation under Section 301, Workmen's Compensation Act.
2. In circumstances, *supra*, employer cannot be held responsible for employe's confusion as to time of day.
3. Employe's presence on bridge was not required by nature of his employment. He had not approached environment of his work, and had not yet assumed the relation of servant to master.

Appeal from disallowance of compensation by referee, District No. 2. Claim petition No. 8410. Department of Labor and Industry. Workmen's Compensation Board, Harrisburg, Pa.

JARRETT, Commissioner, March 1, 1920.—The claimant in this case contends that on March 30, 1919, he met with an accident while going to his work for the defendant company, which entitles him to compensation under Section 301 of the Workmen's Compensation Act of 1915.

The claimant was employed by the defendant company as a fire cleaner in its round-house north between 6th and 7th streets, Reading, Pa. There are two ways to go to the round-house from the home of the claimant, the Spring street way, which took the claimant about an hour and a quarter, and the bridge way, which took the claimant about six or seven minutes. On the morning of the accident the claimant says that he went the bridge way. The round-house is located three or four minutes walk from the bridge.

The claimant says that on March 20, 1919: "I got awake in the morning. My watch was stopped; I went downstairs and I seen it was about four o'clock and I was afraid that if I went back to bed I would fall asleep and would not get up in time." He went downstairs and found it was four o'clock. He says that he got the time from a watch that was there.

It seems that the claimant was confused by the change of time;

this being the date that the time was changed under the day light saving ruling. He says that he did not know, when he found it was four o'clock, whether it was the new time or the old time. He left his house and when crossing the bridge, which is owned by the defendant company and which is used by the employes of the defendant company and others, not employes, "an engine passed under the bridge and the fumes from the engine made him lose his balance" and he fell off the bridge to the ground. He does not know what time the accident happened but the testimony of men who picked him up shows that it happened about 3:35 a. m.

As a result of this fall the claimant's right leg was injured. He was taken to the hospital at about 4 a. m., and his right leg was amputated above the knee.

The bridge from which the claimant alleges he fell has a railing along the side about four feet high and it was over this railing that the claimant fell when he lost his balance. We are unable to see how this would be possible but we think it not material as we think the real question in the case is: Was the claimant's presence required on the bridge or the premises of the defendant company at the time of his injury "by nature of his employment?"

Section 301 of Workmen's Compensation Act of 1915, in part, is as follows:

"The term 'injury by an accident in the course of his employment,' as used in this article, shall include all injuries by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employe, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, *the employe's presence thereon being required by nature of his employment.*"

The part underscored is what we think is applicable in this case.

The claimant alleges that he was confused as to the time. If he was, his testimony does not bear out the position he takes, as in his testimony he says that it would take him about six or seven minutes to walk from his house to the round-house by going the bridge way, and about an hour and a quarter the Spring street way. Then he admits on page 7 that he had plenty of time this morning to go around by Spring street. Then when we take the time, he found it was—four o'clock—allowing him fifteen minutes

to get ready, six or seven minutes to go to the round-house where he was employed, he would still be at his work thirty-eight minutes before starting time. The employes were not in the habit of getting to work so early before starting time, as the evidence shows that it was the custom of the men to report five or ten minutes before starting time. But even if true that the claimant was confused as to the time, that was no fault of his employer. It would be grossly unreasonable to hold an employer responsible in such a case. If this accident had happened a reasonable time before his employment started, it might be otherwise, but this is such an unreasonable time that we must hold that his presence on the premises at that time was not "required by the nature of his employment."

The appellant assigns as errors certain facts as found by the referee as follows:

"The claimant, a fire cleaner at the defendant's round-house at Reading, ordinarily arrived at his place of employment between 6:50 and 6:55 a. m. The claimant lived east of the railroad property and in going to work invariably entered the defendant's property on a bridge which led toward the round-house."

"On March 30, 1919, the claimant, confused by the change of time, crossed the bridge about 3:30 a. m., was made dizzy by the fumes of a locomotive passing under the bridge, fell from the bridge and broke his leg in such a way that it had to be amputated."

These findings are substantially correct and we therefore overrule the assignments of error.

The appellant also assigns as error certain conclusions of law as found by the referee as follows:

"That the claimant had not yet reached the surroundings of his employment. He had not yet approached the environment relating to his work. He had not yet assumed the relation of servant to master."

We hold that the parts assigned as error are unnecessary, except the latter part of the assignment of error: "He had not yet assumed the relation of servant to master," which we think is correct. We will modify the conclusions of law by striking out: "That the claimant had not yet reached the surroundings of his employment. He had not yet approached the environment relating to his work," and adding in its stead: "That the claimant's presence on the premises of the employer at the time of the injury was not required by the nature of his employment."

And now, February 24, 1920, the disallowance as found by the referee is sustained as modified and the appeal dismissed.

Concurred in by Chairman Mackey and Commissioner Houck.

R. G. Bushong, for appellant.
George Gowen Parry, for appellee.

Court of Common Pleas of Luzerne County.

NORTHRUP & BOWDEN *v.* SPAK *et al.*

Mechanic's lien—Notice—Time of filing.

1. Where mechanic's lien is filed with averment "material furnished for alterations and repairs" notice of intention to file (Act 1901, P. L. 431) served on owner as June 5, the last material furnished May 15, the filing is too late.
2. Question whether claim may commingle material for alterations, and for additions to building, not decided.

Scire facias sur mechanic's lien. Affidavit of defense and exceptions. Common Pleas, Luzerne county. No. 870, October term, 1910.

STRAUSS, J., March 22, 1920.—Except for the tenth paragraph of the affidavit of defense it would be insufficient. That paragraph however, is as follows:

"The work done in and about the building of this affiant was alterations and repairs, and written notice of intention to file a claim therefor was not given to the owner or to an adult member of his family, or to anyone else acting for him on or before the day the claimant furnished the last of his materials. The last of materials was furnished on May 15, 1919, and no notice was given to the owner until several weeks after that date."

The exception reads as follows:

"That the averments contained in the tenth paragraph of the said affidavit of defense are immaterial and irrelevant and not sufficient in law to make a defense to this action because the mechanic's lien law of June 4, 1901, P. L. 432, Section 3, and the supplements to said law provide that "a substantial addition to a structure or other improvement shall be treated as a new erection or construction thereof," and the provision of said law as mentioned in said tenth paragraph does not apply in this case."

The second section of the Mechanic's lien law of 1901, P. L. 431, provides:

"Every structure * * * shall be subject to a lien for the payment of all debts due to the contractor or sub-contractor in the erection * * * thereof, in the addition thereto and in the alteration and repair thereof * * *. Nor shall any claim for alterations or repairs * * * be valid * * * in the case of a sub-contractor, unless written notice of an intention to file a claim therefor if the amount due shall not be paid, shall have been given to the owners, or some one of them, or for him to an adult member of his family, or the family with which he resides * * * on or before the day the claimant completed his work or furnished the last of his materials."

The foregoing section of the Act regulates the notice to be

served in cases of alterations and repairs. In all other cases the serving of notice is regulated by Section 8 of the Act (P. L. 434, 3 Purdon 2474, pl. 17) as amended by the Act of March 24, 1909, Section 1 (P. L. 65, 6 Purdon 6599, pl. 1). Under these provisions the notice of a purpose to file the lien must be served at least one month before the lien is filed and within three months after the last work was done or materials furnished.

Whether a lien shall come under one or the other of these sections must appear on the face of the claim. In the case before us the third paragraph of the claim avers that it is for material furnished "for the alterations, repairs and addition being placed by the said Alexander Spak, contractor, to the house owned by Joseph Leposki on Newport street."

Possibly the facts in this case would have sustained a lien for the addition as a new construction. Taking the lien, however, as it appears with its averment "for material furnished for alterations and repairs," the notice attached to the claim, as shown by proof duly sworn to, was served May 31, 1919, on the contractor, and on June 5, 1919, on the owner, while the last material, as shown on the bill attached to the claim was furnished on May 15. To the extent to which these materials were furnished for alterations and repairs the notice should have been given "on or before the day the claimant completed his work or furnished the last of his materials, that is to say on or before May 15. We must, therefore, discharge the rule for judgment. We have not considered whether a claim may commingle materials for alterations with those for additions.

Rule for judgment for want of a sufficient affidavit of defense is hereby discharged.

G. L. Fenner, for plaintiff.

M. F. McDonald, for defendant.

KEISER *v.* HART *et al.*

Municipalities—Officers—Treasurer—Appointment of clerks.

1. The only change in the Act of 1913, P. L. 601, made by the Act 1919, P. L. 903, is in making the office of city treasurer elective by the people. Provisions of third class city Act 1913—that treasurer's assistants shall be appointed by the council—remain unaffected by the later Act.
2. While it may be that an elected officer has an inherent right to make his own appointments and that it is against public policy to make him responsible for the acts of subordinates not of his choice, the remedy is in legislation.

Injunction bill. Common Pleas, Luzerne county. Sitting in Equity. No. 8, March term, 1920.

WOODWARD, J., March 19, 1920.—The plaintiff, treasurer of the city of Wilkes-Barre, duly elected at the regular municipal elec-

tion held on the fourth day of November, 1919, having qualified by giving bond in the sum of \$200,000, and appointed Arthur L'Hommedieu as his deputy and Thomas Price as his chief clerk, brings this bill to restrain the mayor and city council of Wilkes-Barre from preventing his appointees from performing their duties and from maintaining in their stead Frank Kelly and Joseph Murphy as deputy treasurer and chief clerk respectively.

The defendants answer that they have made no appointments of deputy treasurer and chief clerk, but have provided by ordinance three clerks for the treasurer's office, two of whom are Frank Kelly and Joseph Murphy, at salaries of \$2,800 and \$1,600 per annum, respectively. This they claim the right to do under the Clark or Third Class City Act, passed in 1913, P. L. 601, which provides that "the Council shall have the power of appointment and dismissal of all employees and subordinate officers of the city except as otherwise provided by this Act."

Under the Clark Act the city treasurer himself was elected by the council and his clerks were appointed by the council. In 1919 the Legislature passed an Act (P. L. 903) providing that "there shall be elected at the municipal election in the year 1919, and every fourth year thereafter, a city treasurer, who shall hold office for a term of four years from the first Monday of January next succeeding his election, and until his successor is duly elected and qualified, or until the said treasurer shall have been removed from office according to law. The city treasurer shall be a competent accountant, and shall have been a resident of the city and an elector thereof for at least three years previous to his election. He shall give lawful bond to the city, with two or more sufficient sureties, or with a surety or other company authorized by law to act as surety, to be approved by the council, in such sum as it may by ordinance direct, conditioned for the honest and faithful discharge of his official duties and the safe keeping and payment over of all public moneys entrusted to his care. He shall receive a fixed annual salary, to be provided by ordinance."

This Act is silent as to the appointment of deputies or assistants. The only change it made in the Clark Act was in making the office of city treasurer elective by the people instead of by the Council. The two Acts must be read together, and if any clerks are needed they are to be appointed by the council under Section 8 of Article VII, quoted above.

The treasurer-elect thus finds himself dependent upon assistants not chosen by himself, but for whose conduct he is responsible to the amount of \$200,000, and justly complains. But his relief must come from the Legislature and not from the Court. If the Act of 1919 making the office elective had provided that the assistants of the treasurer should be appointed and paid by the city council it would have produced the same result, but the

power of the Legislature to so provide would not have been questioned. The present situation is the same, because there being no repealing clause the Acts of 1913 and 1919 must be read together, and the only change in the former Act made by the latter is in making the office of treasurer elective by the people. The plaintiff argues that there is an inherent right in an elected officer to his own appointments; that it is against public policy to make him responsible for the acts of subordinates not of his choice. But no authorities are cited for these propositions. While we appreciate the plaintiff's position and would be moved by the force of his argument to grant relief were it in our power, we cannot indulge in judicial legislation.

By agreement this hearing was treated as final.

Injunction refused, and the bill dismissed at the costs of the plaintiff.

Thomas Butkiewicz, H. B. Hamlin, for plaintiff.
C. F. McHugh, R. B. Sheridan, E. B. Morgan, for defendants.

NALBACH *v.* NALBACH.

Bankruptcy—Discharge of judgment—Satisfaction—Moral obligation—Consideration.

Where judgment is automatically discharged by defendant's discharge in bankruptcy, said judgment will not be marked satisfied. It still remains a moral obligation which would be sufficient consideration for a new promise to pay.

Common Pleas Luzerne county. No. 183, March term, 1915.

STRAUSS, J., December 30, 1919.—This judgment was entered on January 21, 1915. On October 12, 1915, the defendant was granted a discharge in bankruptcy by the District Court of the United States, the effect of which was to discharge him from all debts and claims which were provable against his estate. This judgment was thus provable and was in fact included in his schedule of liabilities. The application now is to mark the judgment satisfied. We shall not comply with that request because the judgment has not been satisfied but is discharged as a result of bankruptcy proceedings without satisfaction. It still remains a moral obligation though not a legal one but this moral obligation would be a sufficient consideration for a new promise to pay the debt.

Rule to show cause why judgment shall not be satisfied, is modified to rule to show cause why the judgment shall not be discharged in consequence of discharge in bankruptcy and as thus modified the rule is made absolute.

M. H. Salsburg, for plaintiff.
W. P. Burke, for defendant.

McKENNA *et al. v. VOIGT.*

Contract—Lease—Death of one party—Agency—Evidence—Replevin—Act June 11, 1911, P. L. 287.

1. Act June 11, 1911, P. L. 287, preserves equality between parties to a contract where one of them has died. In contract of lease, where the transaction has been between one party and the agent of another, and where the agent is allowed to testify to matters occurring within the life of his principal, the mouths of the other parties are not closed by the death of said principal.
2. Thus where terms of lease stipulated that rent for the period should become due and payable on any failure of payment, where the parties held over beyond the term, did not give notice in writing of intention to move, but did notify agent orally of their desire, he expressing willingness if they would secure another tenant, which was done, and where on attempted removal of goods distraint was made for rent and replevin sued out.
3. Here the facts as to agent's authority and scope thereof are for the jury.

Common Pleas, Luzerne county. No. 990, October term, 1913.

WOODWARD, J., December , 1919.—This case comes before us on exceptions to the referee's report. The action is in replevin, the plaintiffs having replevied their property levied on by a bailiff on a landlord's warrant issued by Appolonia Voigt for rent alleged to be due for the balance of the term under a lease for a property at the corner of Washington and East Market streets, in the city of Wilkes-Barre, on the ground that the lessees had broken the covenant in the lease against removing or attempting to remove during the term, thereby causing the rent for the balance of the term, from July 31 to April 1, to become due. The plaintiffs gave a bond in the sum of \$1,000, fixing the value of the goods distrained at that amount, and the referee directed that judgment be entered in favor of the plaintiffs for the goods described in the writ, conditioned that the plaintiffs pay to the defendant's executors the sum of \$1,000, with interest, defendant having died during the pendency of the suit.

The referee held that the plaintiffs were incompetent witnesses to testify to anything that happened in the lifetime of Appolonia Voigt, under the Act of 1887, but nevertheless took their testimony under objection, and seems to have considered it in making his report.

From the testimony taken and attached to the referee's report, it appears that the plaintiffs had a lease from Appolonia Voigt for three years from April 1, 1910, which provided for a yearly

rental of \$3,000 dollars, payable \$250 monthly, in advance, and that the lessees are "not to remove, attempt to remove, or manifest an intention to remove any goods and chattels from the said premises, nor permit the same to be attached or taken in execution during the term, while any part of the rent is unpaid; that upon breach by the lessees of any covenant or agreement herein contained, express or implied, the entire rent for the term unpaid shall become immediately due and collectible by distress or otherwise," with a confession of judgment for the sum of \$3,000, rent and liquidated damages, with interest and attorney's commission of 10 per cent., if collected by legal process, and amicable action of ejectment, with confession of judgment in favor of the lessor, her successors and assigns.

It was also agreed that the lessees might terminate the lease at the end of any year from its beginning by giving four months' previous notice of such desire to the lessor in writing, and that the lessees should have the privilege of extending the lease for an additional period of two years from its expiration upon the same rental, terms and conditions, by giving four months' previous notice of such desire before the expiration of the lease; provided that the premises had not in the meantime been sold.

At the end of the three years' period, April 1, 1913, the plaintiffs, without giving any notice, as stipulated in the lease, simply held over and continued to pay the rent monthly, in advance, until June 1, 1913, when they moved their business to another store on South Main street, and were engaged in moving their goods from the decedent's premises when they were levied upon by the bailiff under the landlord's warrant July 28.

The plaintiffs had never had any direct negotiations with Appolonia Voigt, either in the making of the lease or the payment of the rent, but all their transactions had been with James Cool, her son-in-law and agent for the management of the property, who is now substituted on the record as one of her executors.

Sometime in 1913 the plaintiffs expressed a desire to Mr. Cool to terminate the lease and Cool told them that he thought there would be no trouble about it if they secured a satisfactory tenant to take their place. They did secure a tenant, and Mr. Cool, at the expense of the new tenant, went to Atlantic City to confer with Mrs. Voigt, who was sojourning there, and returned with the information that she was willing to have the lease terminated

with the plaintiffs if they would secure for her a satisfactory tenant; whereupon negotiations were entered into between Mr. Cool and the firm of Shelley & Lewis, and a lease was drawn up between Mrs. Voigt and Shelley & Lewis by Mr. Dilley, the attorney for Mr. Cool, who called on the plaintiffs with Mr. Dilley and exhibited the lease to them and requested them to pay Mr. Dilley for his services in drawing the lease, which they did. Plaintiffs thereupon advertised a removal sale, with large posters on the front of their premises, and continued such sale until they actually started to move. They negotiated for a lease of other premises on South Main street and actually signed a lease for those premises, and Mr. McKenna testifies that when there was a hitch in the negotiations between them and their new landlord for the lease of the premises on South Main street that he reported it to Mr. Cool, and Mr. Cool said, "we have gone with this other party; it is necessary for you to vacate". Mr. McKenna testifies that this was in the middle of May, and that they continued their removal sale, advertised as described above, until the landlord's warrant was served upon them during the actual removal of their property, on July 28, the rent being paid up to July 31.

We find that the referee erred in holding that the plaintiffs were incompetent witnesses as to anything occurring before the death of Mrs. Voigt, because James Cool, her agent, had testified to such matters as a witness for the defendant, which brought the case within the purview of the Act of June 11, 1891, P. L. 287, which provides: "That hereafter in any civil proceeding before any tribunal of this Commonwealth, or conducted by virtue of its order or direction, although a party to the thing or contract in action may be dead, * * * and his right thereto or therein may have passed, either by his own act or by the act of the law, to a party on a record who represents his interest in the subject in controversy, nevertheless any surviving or remaining party to such thing or contract, or any other person whose interest is adverse to the said right of such deceased party, shall be a competent witness to any relevant matter, although it may have occurred before the death of said party, if and only if such relevant matter occurred between himself and another person who may be living at the time of the trial and may be competent to testify, and who does so testify upon the trial, against such sur-

viving or remaining party, or against the person whose interest may be thus adverse, or if such relevant matter occurred in the presence or hearing of such other living or competent person".

The purpose of this legislation was to preserve an equality between the parties to a contract where one of them had died. It would be manifestly unequal and unfair where the transaction had been between a party and the agent of another party that the agent should be allowed to testify to any matter occurring in the lifetime of his principal, and that the mouths of the other parties should be closed by her death; and to correct this apparent oversight in the Act of 1887 the Act of 1891 was passed.

It is true that the referee, after holding that the plaintiffs were incompetent witnesses, took their testimony under objection and considered it in his adjudication, but it is possible that he may not have given it the same weight that he would have done if he had not thus discredited it.

It seems to us from the testimony that the question whether the permission given to the plaintiffs to remove from the premises and give up the lease was within the scope of the agent's authority, was a question of fact for a jury, under all the circumstances of the case, and as the referee took the place of a jury and had the witnesses before him, and was better able to judge of their credibility than the Court would be from reading their testimony, we have decided to refer the case back to the referee and have him go over the testimony, giving the same credit to the testimony of the witnesses whom he erroneously held to be disqualified that he would have given if he had not so held, and to find as a fact whether the conduct of both owner and the agent did not justify the tenants in believing that the agent had full charge of the property, the question of the extent of his authority being a question of fact for the jury under the circumstances, and not a question of law for the Court; and we refer the referee to the decision of the Court of Allegheny county in the case of Potter Title and Trust Company, Admr., *v.* Davis, reported in 66 Pittsburg Legal Journal, page 399, where a new trial was refused in an action of replevin, the plaintiff having recovered a verdict against the landlord for an illegal levy, it appearing that plaintiff's goods were levied upon for the year's rent under the terms of the lease after the agent had ordered the tenant to remove from the property. It was held to be no defense that the agent was not acting within the scope of his authority in ordering a levy, when by the conduct of both, and owner and the agent, the tenant had been led to believe that the agent had full charge of the property. It was held that the question of authority was a question of fact for the jury and not a question of law for the Court.

Case referred back to the referee to make further report.

C. B. Lenahan, for plaintiff.

H. A. Gordon, for defendant.

DOWLING *v.* HURWITZ.

Workmen's Compensation Act—Tolling of statute on agreement—Limitation of period.

1. Condition of contract, Workmen's Compensation Act which provides no limitation on the period for which payment shall be made, is subject to correction under Section 423 which provides for review by the Board.
2. Where compensation agreement is entered into between claimant and defendant the run of the statute (Section 315) is tolled.

Rule to show cause why judgment shall not be stricken off. Common Pleas, Luzerne county. No. 242, December term, 1919.

STRAUSS, J., March 22, 1920.—The judgment in this case based on a Workmen's Compensation compromise agreement, was entered upon application of the plaintiff, October 15, 1919, in accordance with section 429 of the Workmen's Compensation Law of 1915, P. L. 736.

The agreement as filed is indefinite in that although it fixes the compensation at the rate of five dollars per week, the blank intended for stating the number of weeks during which compensation shall be paid, whether under sections 306-a, 306-b or 306-c has not been filled out.

On November 6, 1919, the defendant on petition obtained the present rule. That petition admits the correctness of the copy of the compensation agreement as filed and informs the Court that, dated the — day of May, 1918, it was actually executed May 10, 1918; that ten dollars compensation has been paid under it covering two weeks ending April 26, and that no further payment was made after that date, whereby more than one year was permitted to elapse before any further action, the first action thus taken being the filing of the agreement and entry of judgment in this case. The defendant therefore averred that pursuant to Section 315 of the compensation law, the plaintiff is not entitled to any compensation because more than one year had elapsed since the last payment was made, and for justification of this attitude sets out Section 315 at length as follows:

"In cases of personal injury all claim for compensation shall be forever barred unless within one year after the accident the parties shall have agreed upon the compensation payable under this article, or unless within one year after the accident one of the parties shall have filed a petition as provided in Art. IV hereof. In case of death all claims for compensation shall be forever barred unless within one year after the death the parties shall have agreed upon the compensation under this article, or unless

one year after the death one of the parties, shall have filed a petition as provided in Art. IV hereof. Where, however, payments of compensation have been made in any case said limitations shall not take effect until the expiration of one year from the time of the making of the last payment."

The exact question now before us was ruled by the Workmen's Compensation Board in *O'Brien v. The S. B. Charters Co.*, 4th Workmen's Compensation Supplement 1646, or 4th Dept. Rep. 1646. The only difference between the contract is that case and the contract here is to be found in the fact that there it was specifically provided that "duration of weekly payments will be made as required by the Compensation Law of Pennsylvania," while here there is no period of duration named. Mr. Mackey, chairman of the Board, filed a very well considered opinion from which we extract the following:

"When the compensation agreement was entered into between the claimant and the defendant, the running of the statute was tolled. The concluding clause in that section (315) is intended to extend the time of the running of the statute of limitations, so that if an employer in the absence of a formal agreement or an award, makes payment to an injured workman in lieu of compensation and then ceases to pay, no immunity can be gained thereby until twelve months after such last payment be secured to the employer. This clause is intended to protect a workman against an employer who might pay compensation for twelve months without a formally executed agreement and then cease paying and set up the claim that the statute of limitations barred further compensation because no petition had been filed nor agreement had been formally executed within a period of twelve months after the injury."

This reasoning seems to us unanswerable and we adopt it without further discussion. The unfortunate condition of this contract providing no limitation upon the period for which payment shall be made, is subject to correction under the Workmen's Compensation Act, Section 423, which provides for a review by the Board of the terms of the agreement upon a petition alleging fraud, mistake, coercion, or other proper cause.

It has also been suggested that the contract is subject to the correction by the Board under Section 426. That section, however, is inapplicable as the authority of the Board under it is limited to the approval of certain agreements, or to termination or modification of them on the ground that the incapacity of the injured employe has subsequently increased or decreased or terminated or that the statutes of any dependent may have been changed.

Rule discharged.

Roger Dever, for plaintiff.

Andrew Hourigan, for defendants.

WEST v. COUNTY COMMISSIONERS.

*Election laws—Nominations—Substitution of candidate for one withdrawn
—Act of 1893.*

Where in case of death or withdrawal of a nominee for public office, another is substituted by the party, certification to the county commissioners should be signed by all the members of the committee authorized to make substitution (Act 1893, P. L. 424). Act 1913, P. L. 719, does not repeal provisions of Act 1893.

Petition for writ of mandamus. Common Pleas, Luzerne county. No. 300, December term, 1919.

WOODWARD, J., October 23, 1919.—On October 18, 1919, a writ of alternative mandamus issued to the defendants, county commissioners of Luzerne county, to show cause why they should not receive the certificate signed by the chairman of the executive committee of the Prohibition party of Luzerne county, attested by the secretary and treasurer thereof, and duly acknowledged, dated October 10, 1919, setting forth that the petitioner, Ambrose West, was selected as the nominee of the Prohibition party for the office of county commissioner of Luzerne county to fill the vacancy caused by the resignation of George S. Renard as the nominee for said office of said party, and requesting the defendants to file the same and print the name of Ambrose West as the nominee of the Prohibition party for the office of county commissioner upon the official ballot at the election to be held November 4, 1919. The writ was made returnable on October 21, 1919, at ten o'clock a. m.

After hearing argument and after due consideration, the Court refuses to make the alternative mandamus peremptory for the reason that the certificate does not name all the members of the executive committee of the Prohibition party as required by Section 11 of the Act of 1893, P. L. 424, which provides as follows:

"In case of the death or withdrawal of any candidate nominated as herein provided, the party convention, primary meeting, caucus, or board, or the citizens who nominated such candidate, may nominate a substitute in his place, by filing in the proper office at any time before the day of election, a nomination certificate or paper which shall conform to all the requirements of this Act in regard to original certificates or papers; provided, that if the said convention or citizens shall have authorized any committee, or if any executive committee of any political party be authorized by the rules of said party, to make nominations in the event of the death or withdrawal of candidates, the said convention shall not be required to reconvene nor the said citizens to sign a new nomination paper, but the said committee shall have power to file the requisite nomination certificate or paper, which shall recite the facts of the appointment and powers of the said committee, (naming all its members), of the death or withdrawal of the

candidate, and of the action of the committee thereon, and the truth of these facts shall be verified by the affidavit annexed to the certificate or paper of two members of the committee, and also of at least two of the officers of the convention who made affidavit in support of the original certificate, or two of the citizens who made affidavit to the original paper," etc.

The Act of 1913, P. L. 719, provides, in Section 17, that "vacancies happening or existing after the date of the primary may be filled in accordance with the party rules, as is now or may hereafter be provided by law."

This Act does not repeal the provisions of the Act of 1893, requiring the certificate to name all the members of the committee making it, either specifically or by the clause repealing all Acts generally inconsistent with the Act of 1913, so that the 17th Section, providing for the filling of vacancies after the primary "in accordance with the party rules, as is now or may hereafter be provided by law", requires the certificate to comply with the Act of 1893, which requires the certificate to name all the members of the committee making it. This was decided by Judge McPherson in Berlin *et al.*, Nominations, 22 County Court Reports, 615, by an opinion filed October 25, 1898, for the reasons there stated, which have not been changed by any legislation called to our attention since.

Rule for peremptory mandamus is discharged, and the alternative mandamus is dissolved.

Abram Salsburg, for petition.

Chas. B. Lenahan, for respondents.

COM. OF PA. v. FELL *et al.*

Statement by attorney—Knowledge of facts.

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Rule to strike off plaintiff's statement., Common Pleas, Luzerne county. No. 813, October term, 1919.

WOODWARD, J., February, 1920.—The reason for the rule to strike off plaintiff's statement in this case is that it is not "sworn to by the plaintiff or by some person having knowledge of the facts."

The affidavit to the statement is made by the plaintiff's attorney and states that he has knowledge of the facts. From the nature of this case the attorney for the plaintiff is the only one who could have knowledge of the facts set forth in the statement. He says he has in the affidavit and in the answer filed to defendant's rule which must be taken as true as no depositions have been taken.

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Criminal law—Indictment.

FRAUD.

Mortgage—Satisfaction—Mun.

GIN POLE.

Negligence—Master and servant—Safe.

HABEAS CORPUS.

Infants, minor child, custody.—Where child at dying request of mother has been taken by grandmother, and father asks for custody, two homes about equal in advantage to child, father's natural right would prevail. *Schultz case*, 233.

HIGHWAYS.

Viewers, jurisdiction of court.—Vacating and relaying of highway not a borough street but thoroughfare having termini outside borough limits, can be effected only through Quarter Sessions. Where otherwise done action in trespass will lie. *McCall v. Railroad*, 61. But see 71 *Superior*, 508.

Viewers, vacating, petition, quashing, Act 1872.—Where petition for vacation of road is unaccompanied by affidavit, Act April 9, 1915, P. L. 72, may be invoked to quash petition. *Nescopeck Twp. Road*, 18.

HUSBAND AND WIFE.

Equity—Rescission—Deed—Con.

Executions—Fi. Fa.—Quash.

Justice's court—Juris.—Desertion.

Surety—Discharge.

Divorce.

Estate.

Rights and Liabilities.

Husband and Wife—Divorce.

Alimony, pendente lite.—Where husband resists payment alimony on ground that gross income from business is exhausted by taxes and interest, wife will be preferred to creditors. *Theis v. Theis*, 199.

Alimony, increased allowance, equity, levy on property.—Increased allowance where wife is clearly entitled even where remedy calls for seizure and sale of property in jurisdiction belonging to husband out of jurisdiction. *Watkins case*, 345.

Acts 1907, 1909 and 1913 may be construed in *pari materia* with Act 1867, and under later Acts case can be brought in equity for review. *Id.*

Cruel treatment.—Where cruel and barbarous treatment antedated lunacy, latter condition will not prevent decree. *McDermott case*, 29.

Physical defect.—Where physical defect of wife, rendering her incapable of procreation is assigned as divorce cause, but before decree defect is cured, the libel fails. *Leventhal case*, 207.

Resumption marriage relation, alimony.—Where husband sues for divorce, wife makes denial of charges, husband answering her application for alimony that she is living with another man, and facts show that after alleged adultery husband and wife resumed marriage relation, that husband has not complied with mandate of court as to wife's support, alimony and counsel fees will be decreed. *Spare v. Spare*, 28.

HUSBAND AND WIFE—ESTATE.

Trust, rights of survivor, equity.—Where husband during temporary separation from wife executes deed of trust to third party, obviously intended as fraudulent gift, intended to defraud wife, equity will decree amount involved as joint property of wife until former's death, and after death as her property. *Steck v. Repa*, 291.

HUSBAND AND WIFE—RIGHTS AND LIABILITIES.

Courtesy, real estate, conspiracy.—Where husband living apart from wife seeks injunction against sale wife's property, urging conspiracy, he must show such, by preponderance of evidence. *Epper case*, 371.

Equity, deed, recording.—Where one six days before marriage conveys his real estate to daughter, but continues to live upon it and pays taxes until his death, after which deed recorded, equity will decree wife same interest in real estate as if husband had died intestate. *Nicholson v. Rittenhouse*, 65.

Support, money held by wife, interpleader.—After execution against husband and rule for interpleader, wife claiming certain goods, her testimony "I bought it," "my husband did not own it," is far short of establishing her title. She must prove that purchase was with funds not furnished by her husband. *Dehaut v. Gibbons*, 193.

IMPOUNDING GOODS.

(*Third party*) *Replevin—Act 1905.*

INCORPORATION.

Boroughs—Inc.

Indexing.

(*Suits*) *Decedents' Estates—Debts.*

INDICTMENT.

Criminal law—Ind.

INFANTS.

Habeas corpus—Infants.

Adoption, minor child, revocation decree.

—Where child is legally adopted by husband and wife, child's father having deserted family, mother re-marries, and petitions for custody of child, revocation of decree refused if child is content, suitably cared for and natural mother has one other child, three step-children, etc. *Rutstein case*, 309.

INJUNCTIONS.

Beneficial societies—Members—Pol.

Common schools—Officers.

Constitutional law—Mun.—Boroughs.

Election laws—Mun.

LIE WHEN.

PRELIMINARY.

INJUNCTIONS—LIE WHEN.

Borough, sewer, cost.—Injunction against cost of sewer refused where need is urgent, and no violation of defendant's duty shown. *McCabe v. Borough*, 215.

Equity, jurisdiction, issue, right of way, practice.—Where after bill for injunction against blocking up way, defendant requested certification to law side met denial and renewed request and again at final hearing asked for issue, Supreme Court having decided that refusal to certify was interlocutory, defendant, protected by interlocutory decree and entitled to adjudication of preliminary question has no remedy except to raise question at final hearing. *Drum v. Dinkelacker*, 455.

Certification to law side and issue good practice in absence of other procedure provided by statute or rule of court. *Id.*

Merger, sale of land, lease, timber rights.

—Injunction will lie to prevent cutting of timber during lease term where sale was effected during term, deed reciting that rights were not merged in ownership and lease conferring right to cut timber for repairs and maintenance. *Central Poor District v. Wildoner*, 252.

INJUNCTIONS—PRELIMINARY.

Borough, ordinance, transcribing.—Injunction against purchase of fire apparatus granted because ordinance had not been properly transcribed, may be dissolved on proper transcription. *Keirle v. Borough*, 283.

INSURANCE—FIRE.

Contract, laches, non pros, statement.—Where plaintiff brought suit on contract

within a year after fire, statement two years after, though in time for earliest probable trial in condition of trial list, *non pros.* urged in analogy to statute of limitations, denied. *Zuckerman v. Teutonia*, 102.

Insurable interest, disclaimer.—Where after destruction property by fire insurance company avers that insured had, subsequent to assignment of policy in action of ejectment, filed disclaimer to title to premises, he had no insurable interest and cannot recover. *Morrett v. Fire Ass'n*, 42. *Aff.* 265 *Pa.* 9.

Insurable interest, title, assent of agent. Where insured at time policy was transferred to him had no deed for insured building, but mere contract of sale, but agent of company with knowledge of facts approved assignment, insured may recover. *Morrett v. Fire Ass'n*, 211.

Ratification policy, estoppel.—Facts as to ratification of policy and estoppel must be unequivocally established to justify binding instructions. *Lloyd v. New Jersey F. I. Co.* 251.

INSURANCE, LIFE.

False statement, applicant, evidence, weight of, jury.—Where in suit by children of first wife on policy held by father of plaintiffs, defense is based on false representations as to health, etc., second wife testifying that deceased had frequently employed physicians for illness, was addicted to drink, and this offset by testimony of children that father was never ill and did not use liquor, and no physicians called to substantiate allegation of illnesses, and verdict for plaintiff, new trial and judgment n. o. v. refused. *Bower v. Baltimore Life*, 443.

Physician, suit for examining applicants, contract severable.—Where physician sues company for examining applicants, different examination rates for classes, and affidavit admits a certain total due, but avers false returns in four cases, contracts will be adjudged severable, and plaintiff may recover for services in which there was no default. *Foster v. Penn. Mutual*, 442.

INTERLOCUTORY DECREE.

Injunctions—Prelim.—Equity.

INTERPLEADER.

Executions—Int.

Husband and wife—Rights and liab.—Support.

Judgments—Con.—Coll.

INTERSTATE COMMERCE.

Workmen's compensation—Jurisdiction.

JUDGMENTS.

Affidavit defense—Practice—Waiver.

Contempt of court—School.

Practice—Judgments.

CONCLUSIVENESS.

GENERALLY.

OPENING.

SATISFACTION.

JUDGMENTS—CONCLUSIVENESS.

Collateral attack, collusion, judgment from another county, interpleader.—Where no fraud or collusion are shown, judgment entered in another county, on which execution has been issued, cannot be attacked by claimant in interpleader, etc. *Ruth v. Auto. Co.* 333.

JUDGMENTS—GENERALLY.

Nunc pro tunc, borough, collusion.—Where judgment against borough by apparent collusion on baseless claim, appeal *nunc pro tunc* will be allowed by intervening taxpayer after twenty days. *Quigley v. Borough*, 223.

Trustee, preference, assignment.—Judgment to trustee is valid, except where fraud, collusion or intent to defraud is shown. *Pettebone case*, 299.

JUDGMENTS—OPENING.

Bond, mortgage, notice, parol agreement, sheriff's sale.—Judgment on mortgage bond for balance of debt not realized on sheriff's sale, will not be opened on ground that plaintiff's attorney had agreed to give defendant notice of foreclosure, which he had failed to do, where attorney's authority is doubtful. *Baldwin v. Moyles*, 175.

Evidence, consideration, power of attorney.—Where judgment attacked on ground of failure of consideration, and evidence established that it represented bona fide indebtedness, judgment will not be opened. *Kulick v. Morrett*, 341.

Judgment note, forged signature.—Defendant's denial of signing note supported by two expert witnesses, judgment will be opened though subscribing witnesses and comparison of signatures indicates otherwise. *Glennon v. Hrobak*, 367.

Married woman, surety, separate estate, depositions.—Where proceeds of note applied to improvements on wife's real estate with her knowledge, despite her averment of suretyship for husband, judgment will be opened. *Glennon v. Hrobak*, 367.

Laches, execution to collect rents.—Where defendants delay several months before motion to open judgment, delaying plaintiff's collection by unfounded claim of third party, judgment will stand. *Kotarski v. Jackier*, 414.

JUDGMENTS—SATISFACTION.

Bankrupt, defendant's discharge, moral obligation.—Where judgment is automatically discharged by defendant's discharge in bankruptcy, said judgment will not be marked satisfied, still remaining as moral obligation which would be sufficient consideration for new promise to pay. *Nalbach v. Nalbach*, 466.

JURISDICTION.

Equity—Jurisdiction.

Highways—Vacating.

Injunction—Preliminary.

Justice's court—Jur.—Desertion.

Lunacy—Attorney's fees—Jur.

Mortgages—Generally—Sci. Fa.

Practice—Appearance—De bene.

JUSTICE'S COURT.

Appeal, striking off, certiorari, passim.—Conceding local Act 1870, P. L. 269, operative, where defendant in good faith makes affidavit and gives recognizance, proper to allow appeal to be perfected. *Smith v. Smith*, 336.

Plaintiff's right under Act, *supra*, in doubt where record does not show labor performed in the county. *Id.*

Appeals, non resident taxpayer, Borough Act 1915.—General Borough Act 1915, P. L. 426, gives non resident taxpayer of defendant municipality right to intervene and take appeal from justice of peace. *Quigley v. Borough*, 90.

Jurisdiction, desertion, non support, arrest in another county.—Warrant issued by wife for non support may be issued in a county other than that in which husband resides, but arrest in the county where husband is found cannot be made, until warrant is backed by alderman or justice of that county. *Vogt case*, 201.

Record, exception, property attached for debt.—On exception to record of justice of peace where property is attached for debt under Act 1842, record should show what attached property consisted of, and that inventory was left with person in whose possession property was found. *Cantor v. Kasarda*, 64.

Record, wages, attachment execution, board.—No error for justice to set out that attachment arose for wages. Attachment would be good if debt arose in any other manner. *Mason v. Hughes*, 81.

LACHES.

Insurance, Fire—Contract.

Judgments—Opening—Lease.

Practice—Non pros.—Delay.

Non pros.—Laches.

LANDLORD AND TENANT.

Constable, distress rent, mandamus, warrant.—Constable may refuse warrant to distrain for rent, and plaintiff may employ another. Mandamus to compel constable to proceed with warrant will be refused where constable does not act, having received information that another owned the goods by virtue of constable's sale. *Williams v. Kocher*, 249.

Distress for rent, unlawful removal of goods.—Where owner of goods had given no notice of title to landlord and had not replevied goods, and after constable's sale and insufficient proceeds to pay rent owner removes goods distrained, he cannot urge as defense that there was no appraisalment—and he is liable in damages. *Myers v. Morgan*, 295.

Lease, assignment, remedies, ejectment.—Assignment of lease should carry all remedies contained therein whether the words "successors and assigns" are used or not, and should apply to confession of judgment in ejectment as well as to right to distrain for rent. *Gaughan v. Brady*, 275.

Lease, covenants, saloon, repossession.—Where premises are leased for sale of liquors, with condition that if lessee does not conduct licensed saloon, lessor may re-enter, and that in event of intoxicating liquors not sold, lessee is entitled to allowance in rent, and lessee fails to take out license, lessor is entitled to repossession. *Wichner v. Solomon*, 457.

Lease, possession, Act March 31, 1905.—Landlord seeking possession after one month lease must serve written notice—Act March 31, 1905. Averment that landlord did, thirty days before expiration of term, demand and require tenant to leave, not sufficient. *Cech v. Wonsefsky*, 240.

Lease, rent arrears, confession of judgment, attorney, praecipe.—Where A and B, lessor and lessee, assent to assignment of lease to C, C's acceptance of terms, "ac-

cording to full tenor and effect," without ever having signed warrant of attorney to confess judgment, gives prothonotary no standing to enter judgment merely upon praecipe. *Ahern v. Standard Realty Co.* 452. Aff. 267 Pa. 404.

LEASE.

Agency—Authority.

Landlord and tenant—Lease.

(Saloon) Landlord and tenant—Lease—Cor.

Mines and mining—Agreement.

LIQUOR LAWS.

Closing, epidemic, State Health Department.—Where order of State Health Department, in epidemic to close all drinking places is disregarded by licensee, neither confession of non compliance nor plea of large family to support will avail to prevent suspension of license and imposition of costs. License Scanlon, 113.

Closing, fuel, disregard order, Federal fuel administration.—Where Federal administration orders public places closed to conserve fuel, disregard of proprietor of public drinking place will subject licensee to suspension of license. Klimek case, 111.

Closing licensed places, State Health Department.—Where following order State Health Department to close licensed drinking places in epidemic, agents of department admitted on plea of illness find group being served with liquor and themselves participate, proprietor being away and having forbidden sale of liquor—neither hospitality of manager to special guests nor humanity plea will absolve from duty of compliance with regulation. McGarrity license, 107.

Disregard closing order, State Health Department, penalty.—State Health Department has authority under certain circumstances—Act 1905, P. L. 312, to close all places of public resort, including drinking places. But where in absence of proprietor and despite his orders, bartender dispenses bottled goods on pleas of doctor's prescription, with general opening of the place, revocation of license refused. McKenna license, 109.

LUNACY.

Committee, surcharge, account.—Where surcharge has been decreed against committee in lunacy—man or married woman—they are jointly and severally liable for

surcharge and interest thereon. Edwards case, 197.

Attorney's fees, jurisdiction.—Court which appointed committee on lunatic has jurisdiction to authorize reasonable attorney fees to one who has collected money for lunatic. Griffin's case, 300.

LODGING.

Board and lodging.

MANDAMUS.

Contempt of court—School.
Landlord and tenant—Constable.

MARRIED WOMAN.

Judgments—Opening—Marr.

MECHANIC'S LIENS.

Const. law—Special laws—Depts.

CLAIMS.

PLEADING AND PRACTICE.

MECHANIC'S LIENS—CLAIM.

Sufficiency, excavation.—Specification of work, as excavation, giving quantity, price per cubic yard and aggregate amount is sufficient. Ott v. Duplan, 285.

Notice, time of filing.—Where mechanic's lien is filed with averment "material furnished for alterations and repairs" notice of intention to file (Act 1901, P. L. 431) served on owner as June 5, the last material furnished May 15, the filing is too late. Northrup and Bowden v. Spak, 463.

MECHANIC'S LIEN—PLEADING AND PRACTICE.

Improper items.—Where proper and improper items are in claim, better practice to go to trial, where improper items may be rejected by trial judge. Ott v. Silk Co. 286.

MERGER.

Injunctions—Lie when—Bank—Merger.

Mines and mining.

Practice—Process—Sum.

Workmen's Compensation—Passim.

Agreement, lease, breach.—Where owner allows another to enter upon land to prove for coal, and agrees if coal is found to lease at stated terms, but sells to third party, he will be liable for damages in breach. Bolin v. Coal Co., 206.

Coal lease, reasonable time to resume work.—Where lease coal property includes clause that if encountering unusual difficulties lessee is to be released from payment

minimum royalties for reasonable time, and to use best efforts to overcome difficulties, lapse of eleven years not reasonable time and lessor may re-enter. *Coleman v. Reliance*, 427.

Safety passageways, practicability.—Mine law 1891 provides for safety holes along gangway 150 feet apart, where passageway is impractical. Practicability means, not convenience, but accomplishment with reasonable labor and regard for support of gangway. *Kitchen v. Coal Co.* 21.

"If found impractical" means found by mine operator, not "found" by jury. *Id.*

MINE FOREMAN.

Constitutional law—Min.

MORTGAGES.

Attorneys—Authority—Agreement.

Attorneys—Comp.—Mort.

Deeds—Warranty.

Judgment—Bond—Mortgage.

Pleadings—Agent.

Surety—Discharge.

FORECLOSURE.

GENERALLY.

RIGHTS.

SATISFACTION.

MORTGAGES—FORECLOSURE.

Scire facias, statement, Orphans' Court, lis pendens.—*Sci. fa.* on mortgage not abated by fact that mortgagee has begun proceedings in Orphans' Court to have mortgaged premises sold for payment of same debt. *Bartels v. Maslowski*, 383.

MORTGAGES—GENERALLY.

Name of grantor, notice, obligation of grantee.—Purchaser of land, from grantor, signing his name without middle initial, should take notice of prior recorded mortgage given on same land by individual signing middle initial. Mortgagee cannot be charged with negligence in relying on grantor's word, signature and solemnly recorded act, nor be required to search ancient records, city directories, etc. As index would reveal name with initial *terre tenant* would thus be put upon inquiry. *O'Hickey v. Flick*, 114.

Scire facias, issue, jurisdiction.—In expediting process Common Pleas will reinstate action *scire facias sur* mortgage where facts are to be determined regarding fraud and lack of consideration for mortgage, and where, after refusal for issue in Orphans'

Court, petition for administrators sale is pending, mortgagor having died, and Common Pleas action has been discontinued at suggestion of Orphan's Court. *Bartels v. Maslowski*, 137.

MORTGAGES—RIGHTS.

Collection, incidental promise, brewer.—Where mortgage is given by retailer to brewing company and mortgagor makes promise to buy mortgagee's beer, latter's right to enforcement not effected. *Bartels v. Maslowski*, 383.

MORTGAGES—SATISFACTION.

Minor, fraud, collusion.—Where minor executes mortgage, and on maturity brings bill to satisfy, no averment of fraud on him, but indication of collusion of parents to repudiate minor's act, satisfaction refused. *Choma v. Mans*, 312.

If mortgage is cloud on title, it is plaintiff's fault. *Id.*

Striking from record is remedy for fraud on mortgagor. Prayer, *supra*, should have been for nullification of record. *Id.*

MOVING PICTURE.

Affidavit defense—Sufficiency—Moving.

Contracts—Picture film.

Contracts—Exclusive right.

Injunctions—Lie when—Mot.

Municipalities.

Constitutional law—Municipalities.

Election laws—Mun.

CONTRACTS.

INDEBTEDNESS.

IMPROVEMENTS.

OFFICERS.

ORDINANCES.

MUNICIPALITIES—CONTRACTS.

Sewer, manner of payment.—Where municipality contracts for sewer with flat sum named for the work but provision or periodical payment based on unit measurements per yard, and retention of percentage of each payment until completion, balance due at completion to be based on difference between totals paid in unit measurements and entire sum due on such basis—flat sum named is regarded as approximate and to be affected by measurements. *Reilly v. City*, 117.

MUNICIPALITIES—INDEBTEDNESS.

Improvement, bond issue, tax on abutting owners.—Because question submitted to electors called for approval or disapproval

of increase of debt, fund to be used "solely for the purpose" of street improvements, borough not thereby precluded from assessing part of improvement costs on abutting owners, and election could not because of representation, *supra*, be called "false and fraudulent." *Berwick v. Sponsler*, 399.

MUNICIPALITIES—IMPROVEMENTS.

Boroughs, grade, damages, viewers.—Where in appeal from viewers assessment of damages, form of issue, to which defendant has not objected is "what amount of damages has resulted from change of grade" plaintiff need not prove official action of borough in ordering change of grade, or that agreement as to damages has been made. *Wojsiek v. Borough*, 238.

MUNICIPALITIES—OFFICERS.

Clerks, appointment.—Only change in Act 1913, P. L. 601, made by Act 1919, P. L. 903, is in making office of city treasurer elective by the people. Provisions, third class city Act, 1913, that treasurer's assistants shall be appointed by council, remain unaffected by later Act. *Keiser v. Hart*, 464.

MUNICIPALITIES—ORDINANCES.

Taxi-cab, summary conviction.—City's right to regulate parking privileges on streets not to be denied. *Com. v. Edmonds*, 331.

NEGLIGENCE.

Const. law—Generally—Min.

AUTOMOBILES.

CHARITABLE CORPORATIONS.

CONTRIBUTORY.

MASTER AND SERVANT.

STREET RAILWAYS.

NEGLIGENCE—AUTOMOBILES.

Pedestrian, signals, jury.—Question of negligence is for jury when two witnesses heard no signal, and several did, where view was clear, and evidence indicates alternate starting and stopping of car through misunderstanding. *Smith v. Deisroth*, 289.

NEGLIGENCE—CHARITABLE CORPORATIONS.

Acts of employer.—Charitable corporations, limited land holdings, land used for farming and products consumed on the place, not liable for negligence of employer in setting fire to timber on adjacent property. *Wildoner v. Central Poor Dist.*, 424. Aff. 267 Pa. 375.

NEGLIGENCE—CONTRIBUTORY.

Danger known, voluntary risk.—Contributory negligence for foreman to attempt re-

pairs while machinery is in motion, usual way being to wait for stoppage. *Payton v. Upper Lehigh Coal Co.* 179.

Motor truck, collision.—Where one riding on motor truck by permission of driver, with feet on running board, and truck stopped by traffic policeman at street crossing, is struck by trolley car, motorman having disregarded signal of policeman, negligence imputed on part of motorman. Question of contributory negligence on part of plaintiff is for jury, and verdict for plaintiff will stand. *Nikl v. W.-B. R. R.* 83 Aff. 72 Superior 11.

Railroad crossing, clear view.—Where plaintiff is struck by car at crossing despite some evidence of no lights on car, but crossing well lighted and clear view of tracks in both directions, contributory negligence imputed. *Pearse v. W.-B. Railroad* 128.

NEGLIGENCE—GENERALLY.

Brake rod, defective.—Where car runner is fatally injured by fly-back of brake rod, and subsequent examination shows defective ratchet and "dog" of brake, *non pro*., asked on testimony of single fellow workman that at moment of accident injured man was not in position to use brake, will be refused and facts as to negligence left for jury. *Palmer v. East Boston Coal Co.* 29.

NEGLIGENCE—MASTER AND SERVANT.

Burns from explosion, wood alcohol, cause, non suit.—Where employe is fatally burned by explosion in tool house, testimony showing quantity wood alcohol on premises in kerosine oil barrel, but plaintiff's witnesses testify that barrel was tight and spigot properly closed, other testimony that from barrel not tight explosive fumes would emerge, barrel not being type generally used for wood alcohol, no direct testimony as to cause of explosion or that naked light was used, non suit is proper. *Gardner v. Railroad*, 167.

Damages, co-employe, Act 1907, P. L. 523, new trial.—Where laborer employed in road making, unfamiliar work, is placed by superintendent under direction of truck driver, is riding with latter and directed by driver to change to another truck, and driver of latter starts too quickly, and plaintiff is injured, case comes under Act 1907, P. L. 523, and new trial after verdict for plaintiff will be refused. *Manno v. O'Brien*, 157.

Safe working place, gin pole, guy rope, jury.—Where employe engaged in supporting guy rope attached to gin pole, is warned by fellow employe, sent by foreman, that position astride rope is dangerous, fellow employe testifying that he "thought he changed his position" and plaintiff is projected into air by tightening of rope, facts as to negligent setting of pole, safe place to work, etc., are for jury. *Caswell v. Electric Co.* 184.

NEGLIGENCE—MINES AND MINING.

Medical room, removal of injured, Act 1901.—Failure to furnish room for medical supplies and treatment, and to remove injured employe promptly to home or hospital, as required by Act 1901, P. L. 342, renders mine owner responsible. *Hannon v. D. & H.* 187.

NEW TRIAL.

Criminal law—Trial.

Negligence—Master and Servant—Dan.

PRACTICE—NEW TRIAL.

Inexperience of counsel.—Where through inexperience of counsel, complaint is made to trial judge after trial, and no action taken thereon before verdict, new trial may be granted where remarks of district attorney were appeal to race prejudice. *Com. v. Corsino*, 407.

NON PROS.

Insurance, Fire—Contract.

Practice—Non pros.

Laches, statute.—Explanation of illness of plaintiff's attorney would operate to discharge rule for *non pros.*, even after five and a half years' inaction. *Farrell v. Penna Coal Co.* 247.

NON RESIDENT TAXPAYER.

Justice's Court—Appeals.

NON SUIT.

Replevin—Breach.

NOTICE.

Judgments—Opening—Bond.

NUNC PRO TUNC.

Judgments—Generally—Bor.

OPTIONS.

Sale land, deed different dimensions, oral authorization agent, specific performance, damages.—Where one pays for option for

purchase of land and deed is submitted for land of different dimensions, he will be sustained in refusal to accept deed. And where in suit for recovery of option, defendant withdraws motion for non suit and at suggestion of Court substitutes motion for binding instructions, plaintiff will not be entitled to judgment *n. o. v.*, but new trial will be awarded. *Yazminski v. Lewith*, 425. Contract for sale of land not in writing cannot support specific performance but damages may be recovered for breach. *Id.*

ORDINANCES.

Injunctions—Prelim.—Bor.

PLEADINGS.

Agent, authority, mortgage, payments.—Authority of agent (attorney) to receive payments of mortgage principal before due or in amounts less than whole debt cannot be inferred from his agency to accept interest payments. Mortgagor who fails to investigate as to scope of agent's authority not relieved of obligation for principal, without reduction for sums paid to another as agent. *Heebner v. Woitkelawicz*, 411.

Replevin bond, damages.—Averment of damages sufficient where rents due are set forth and for which distress was made, and damages to amount certain made up of costs and loss. *Com. v. Ferrarini*, 267.

Statement, sufficiency, contract.—In suit for breach contract to lease coal land, damages claimed for loss of profits, etc., statement must specifically set forth items claimed. *Bolin v. Coal Co.* 206.

Statement, privity of contract, burden of proof, freight charges, carriers.—Where railroad sues for carriage charges on freight, said freight received from another railroad, and relies upon written contract in which it has privity, but to which it is not direct party, brief statement required by Practice Act not sufficient to show plaintiff's right to recover unless averment showing how privity arises. *P. & R. R. R. v. Bond*, 255.

Where plaintiff is not party to bill of lading he will have burden of proving that he is entitled to recover. *Id.*

A railroad where it avers right to recover for freight carriage after admitting that it has sold shipment, should set forth facts justifying sale. *Id.*

Statement, sufficiency, surety, suit against indemnitor.—In suit by surety company to

recover against indemnitor, manner of payment by company and receipt therefore should accompany statement. American Surety Co. *v.* Lyons, 237.

POOR DISTRICT.

Injunction—Lie when—Merger.
Statutes—Repeal.

Act May 25, 1917, notice, advertisement.—Failure to publish in Carbon and Luzerne counties intention to pass Act May 25, 1917, providing for director at large of Middle Field Coal District voids operation of Act in both counties. Eckert *v.* Walsh, 77.

Poor board, tax collector, taxes, Acts 1901 and local laws.—Act June 20, 1901, P. L. 578, (collection poor taxes by city treasurers) in third class cities does not abrogate provisions of various local laws regulating Central Poor District and which give authority to board to appoint collector. Sec. 15, Act 1901 preserves operation local laws relating to poor taxes and district still retains power to appoint its own collector. Mundy *v.* Gaertner, 120.

POLITICAL ACTIVITY.

Benef. Soc.—Members—Pol.

POWER OF ATTORNEY.

Judgments—Op.—Evidence.

POWERS.

Executors and administrators—App.
Townships—Officers.

PREFERENCE.

Judgments—Generally—Trust.

PRACTICE.

Aff. def.—Supp.—Prac.

Aff. def.—Supp.—Filing.

Boroughs—Streets—View.

APPEALS.

APPEARANCE.

JUEGMENT.

NEW TRIAL.

NON PROS.

PROCESS.

STATEMENT.

PRACTICE—APPEARANCE.

De bene esse, jurisdiction, service.—Purpose of appearance *d. b. e.* to enable defendant to question jurisdiction and he must move promptly to strike off. Too late after jury sworn. Bartels *v.* Maslowski, 383.

PRACTICE—APPEALS.

Statement, affidavit defense, Practice Act.—Requirements Practice Act as to filing and serving statement, and serving affidavit defense on plaintiff or attorney, apply to appeals from justice of peace, as well as to cases begun in Common Pleas. Berliner *v.* Corney, 67.

PRACTICE—JUDGMENT.

Return day.—Where plaintiff has entered judgment for want of affidavit of defense, fifteen days after service of statement, but before return day of writ, judgment will be stricken off. Beishline *v.* Kahn, 181. See 265 Pa. 101.

PRACTICE—NEW TRIAL.

Boroughs—Streets—View.

Absence witnesses, continuance, rule of court.—Continuance because absence of material witnesses, explained only by physician's statement, not sworn to, and physician after opportunity given does not appear, not ground for new trial. Com. *v.* Sanko, 134.

Act 1860, sale, contract, consideration.—New trial not awarded where Act March 31, 1860, P. L. 399, has been construed to relate to contract of sale, and where consideration of sales made and defendant's conduct thereto was submitted to jury, defendant having benefit of question of conscious violation of law. Com. *v.* Sanko, 134.

Charge of court, railroad, public playground.—Where in suit for negligence against railroad for operating near public playground, Court affirms plaintiff's request that if playing were continuous railroad was charged with "extra precaution" and charge weakens foregoing by reciting that there "would have to be something like continuity", new trial allowed. Knelly *v.* Railroad, 229.

Inadequacy of verdict.—Where in action for damages sustained by passenger in trolley accident, negligence of defendant admitted, and no contributory negligence of plaintiff, conflicting testimony as to plaintiff's injury, jury award covering expenses and medical treatment not to be disturbed as inadequate. Sanders *v.* Railroad, 362.

PRACTICE—NON PROS.

Delay, excuse, statement.—Bare lapse two years from filing suit to statement, does not predicate abandonment as where statement is filed in two years and three months, and subsequent negotiations for settlement, illness of plaintiff's wife, etc., are disclosed. Wynne *v.* Railroad, 205.

Delay, statement.—Unexplained delay three years after statement warrants *non pros.* *Salmon v. Railroad*, 170.

PRACTICE—PROCESS.

Foreign corporation, service, constitution.—Acts 1851, 1901, 1903, 1911, do not prescribe exclusive method of service on foreign corporation having offices in county where process is served, as in conflict with Art 16, Sec. 6, Constitution, and service on defendant company "by handing to A, their clerk in charge of department in W. **, he being a clerk and the person in charge thereof, a true and attested copy," is good. *Vederman v. Railroad*, 380, reversing same, 194.

Service.—Service on clerk of corporation at colliery, not chief clerk in executive department, not good. *Mason v. Hughes*, 81.

Summons, mine foreman.—Where service is made on mine foreman of coal company it is defective. *Komar v. Penn'a Coal Co.* 459.

PRACTICE—STATEMENT.

Affidavit defense—Goods sold.

Affidavit defense—Supp.—Statement.

Attorney, knowledge of facts.—In absence of deposition, affidavit of defense by plaintiff's attorney, as one having knowledge of the facts, will be accepted. *Com. v. Fell*, 474.

PRIORITY OF CONTRACT.

Pleadings—Statement—Suff.—Priv.

PUBLIC POLICY.

Common schools—Officers.

PUBLIC PLAYGROUND.

Practice—Appearance—Charge.

QUANTUM MERUIT.

Workmen's Comp.—Generally—Statement.

QUASHING.

Certiorari—Quashing.

Executions—Fi. Fa.

Highways—Vacating.

QUO WARRANTO.

Boroughs—Officers—Election.

Election laws—Municipalities.

RECORD.

(Jus. Peace) Justice's court—Record.

REFEREE.

Arbitration—Referee.

Work. Comp.—Appeal—Ref.

Findings.—Where referee finds certain facts after conscientious effort they should be as binding on Court as verdict of a jury, except referee be in error as to application of law. *Marcus v. Dept. Store*, 60.

REPLEVIN.

Aff. def.—Suff.—Rep.

Agency—Authority.

(Bond) Pleadings—Replevin.

Breach of bond, non suit.—Judgment of non suit against plaintiff in replevin for failure to appear and prosecute suit establishes breach of bond and action may be brought. *Com. v. Ferrarrini*, 288.

Common carrier, contract, bond.—Bad practice to allow consignee to secure goods without bill of lading. Carrier should refuse and ask for quashing of writ. But where possession has been secured rights of all best conserved by proceeding to trial. *Wish & Co. v. Levy*, 353.

Act 1905, goods impounded with parties to controversy.—Act April 14, 1915, P. L. 163, amending Act April 19, 1901, contemplates goods, such as heirlooms, pictures, etc., or antiques having sentimental value, but these Acts do not contemplate impounding household goods, except in hands of third party, and looking to their preservation. *Brown v. Judge*, 437.

RIPARIAN RIGHTS.

Dam and bridge, damage to upper riparian owner.—To support claim for damages upper riparian owner must show that bridge or dam of which he complains effected actual or substantial damage to him, or that there is reasonable ground to apprehend it. *Reilay v. Sardoni*, 43.

RULE OF COURT.

Aff. def.—Suff.—Filing.

SALES.

Goods damaged, expense for replacing.—Verdict reimbursing plaintiff for reasonable expenses in replacing goods found defective before shipment and received in damaged condition, will not be disturbed. *Steinberg & Co. v. Fay*, 71.

SCIRE FACIAS.	TENANCY IN COMMON.
<i>Mortgages—Passim.</i>	<i>Deeds—Warr.</i>
SERVICE.	TITLE.
(<i>Rule</i>) <i>Attachment—Foreign—Service.</i>	<i>Aff. def.—Suff.—Replevin.</i>
<i>Practice—Appearance—De bene.</i>	<i>Equity—Jurisdiction—Right of way.</i>
<i>Practice—Process—Service.</i>	<i>Insurance, Fire—Insur.</i>
SHERIFF'S SALES.	TIMBER RIGHTS.
<i>Judgments—Opening—Bond.</i>	<i>Injunctions—Lie when—Merger.</i>
(<i>Acknowledgment, deed</i>) <i>Execution—Sheriff's sale.</i>	TOWNSHIPS.
SPECIFIC PERFORMANCE.	<i>Constable, resignation.</i> —After constable has presented resignation to Court, and another has been appointed, resignation of first cannot be withdrawn. <i>Mingo</i> case, 80.
<i>Options—Sale.</i>	<i>Officers, powers, contracts.</i> —Discretion township commissioners will not be interfered with in awarding contract for fire apparatus to firm of large experience against another firm apparently formed for purpose of the particular contract, even though latter bid is less. <i>Griffith v. Township</i> , 7.
STATEMENT.	TRUST.
<i>Bailment—Leasing.</i>	<i>Husband and wife—Estate—Trust.</i>
<i>Insurance, Fire—Contract.</i>	TRUSTEE.
<i>Practice—Non pros.—Delay.</i>	<i>Judgments—Generally—Trustee.</i>
<i>Pleadings—Passim.</i>	TRUSTEE EX MALEFICIO.
<i>Practice—Statement.</i>	<i>Executions—Sheriff's sale—Inad.</i>
<i>Practice—Non pros.</i>	TWO-WITNESS RULE.
<i>Practice—Appeals—Statement.</i>	<i>Equity—Rescission—Deed.</i>
<i>Practice—Process—Statement.</i>	UNITED STATES SERVICE.
STATE HOSPITAL.	<i>Const. law—Pub. Off.—Act.</i>
<i>Work, Comp.—Generally—Statement.</i>	VERDICT.
SUMMARY CONVICTION.	<i>(Inad.) Practice—New trial—Inad.</i>
<i>Municipalities—Ordinances.</i>	<i>Sales—Goods.</i>
SURETY.	VIEWERS.
(<i>Married woman</i>) <i>Judgments—Opening—Mar.</i>	<i>Boroughs—Streets.</i>
<i>Discharge, husband and wife, mortgage, security.</i> —Where wife gives mortgage on her separate property as security for husband's note, and mortgagee renewed note from time to time without notice to her, such renewals do not discharge her liability. <i>Bartels v. Maslowski</i> , 383.	<i>Highways—Vacating.</i>
STATUTES.	<i>Municipalities—Improvements.</i>
<i>Repeal, poor laws, third class cities, collector poor tax, Act 1910.</i> —Act June 20, 1901, P. L. 578, does not repeal previous local laws relating to collection of poor tax, and Section 15 expressly preserves these rights to poor board. <i>Mundy v. Gaertner</i> , 212.	WAGES.
TAXES.	<i>Justice's court—Record—Wages.</i>
<i>Common schools—Taxes.</i>	WAIVER.
<i>Evidence—Competency—Land values.</i>	<i>Aff. def.—Practice—Waiver.</i>
<i>Poor district—Poor board.</i>	WARRANTY.
<i>Statutes—Repeal.</i>	<i>Deeds—Warranty.</i>
TAXICAB.	
(<i>Parking</i>) <i>Municipalities—Ordinances.</i>	

WITNESSES.

Practice—New trial—Absence.

WORKMEN'S COMPENSATION.

APPEAL.

GENERALLY.

HEARING DE NOVO.

JURISDICTION.

PRACTICE.

WAGES.

WORKMEN'S COMPENSATION—APPEALS.

Computation of time.—Notes of testimony before referee not part of the record, and judicial review on appeal limited to mere inspection to ascertain whether judgment conforms with law and whether board or referee abused discretion. Conway *v.* Coal Co. 271.

Disease following injury, referee.—Referee's award after finding of good health before accident and total disability afterward, may be justified despite expert testimony of probable tuberculosis before accident, even though Court might not on similar evidence make such finding of fact. Ermel *v.* Penn'a Coal Co. 279.

Employee injured outside of employment, employee's mistake, appeal.—Where cleaner in round house takes short cut over bridge, bringing him to work before customary time, bridge not in area of employment, and he is overcome by fumes of engine passing underneath and falls, sustaining severe injuries, not entitled to compensation under Sec. 301, Workmen's Compensation Act. Bachetti *v.* Director General Railroads, 460.

Referee, evidence, reversal.—Where mine employee found dead in workings, small quantity of vomit near-by, lamp detached, coat smouldering, no witness to death, or evidence of noxious gases, post mortem revealing rupture of syphilitic aorta, and referee finds for plaintiff, board reversing referee, held that facts do not show death caused by means in control of employer. Clark *v.* L. V. Coal Co. 103. But see 264 Pa. 529.

WORKMAN'S COMPENSATION—GENERALLY.

State hospital, mine employee, privity of contract.—Workmen's Compensation Act creates obligation not before existing to procure treatment for injured employees.

Such Act creates privity of contract, and common law imposes obligation on employee

to pay *quantum meruit* up to limitation fixed by Act 1915. Trustees *v.* L. V. Coal Co. 323. Aff. 71 Superior, 545. Aff. 267 Pa. 474.

State Hospital Act does not prevent hospital from looking to employer for compensation for services rendered coal mine employee. *Id.*

Injury to employee on premises of employer.—Where injury caused by operation of defendant's business on defendant's premises, such as operation of train of cars, injured employee entitled to compensation whether at time of injury he is actually engaged in furthering business of employer or not, unless evidence that injuries were self-inflicted. Nowicki *v.* West End Coal Co. 435.

Tolling statute on agreement, limitation of period.—Condition of contract, Workmen's Compensation Act, which provides no limitation on period for which payment shall be made, subject to correction under Sec. 423, which provides for review by the board. Dowling *v.* Hurwitz, 471.

Where compensation agreement entered into between claimant and defendant the run of the statute (Sec. 315) is tolled. *Id.*

WORKMAN'S COMPENSATION—HEARING DE NOVO.

Causal relation between injury and death, referee, reversal by board.—Where referee has awarded compensation, board reversing referee, but evidence sufficient to show causal relation between injury and death, hearing *de novo* will be granted, issue being one of fact. Zadwicki *v.* L. & W.-B. 37.

WORKMAN'S COMPENSATION—JURISDICTION.

Interstate commerce.—Finding by referee that claimant was at time of injury engaged in interstate commerce, ousts referee's authority to proceed. Jurisdiction must be established and finding otherwise is gravity. Weaver *v.* R. R. 373.

WORKMAN'S COMPENSATION—PRACTICE.

Reversal, hearing de novo.—On question of fact, board may approve or on reversal should grant hearing *de novo*. Tigue *v.* Coal Co., 153. Aff. 264 Pa. 590.

WORKMAN'S COMPENSATION—WAGES.

Computation of time.—Where referee and board estimate daily hours as thirteen and seven-day week, traversing Sec. 309, Art. 3, W. C. Act, appeal may be dismissed where referee's findings do not include testimony. Conway *v.* Hudson Coal Co. 271.

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